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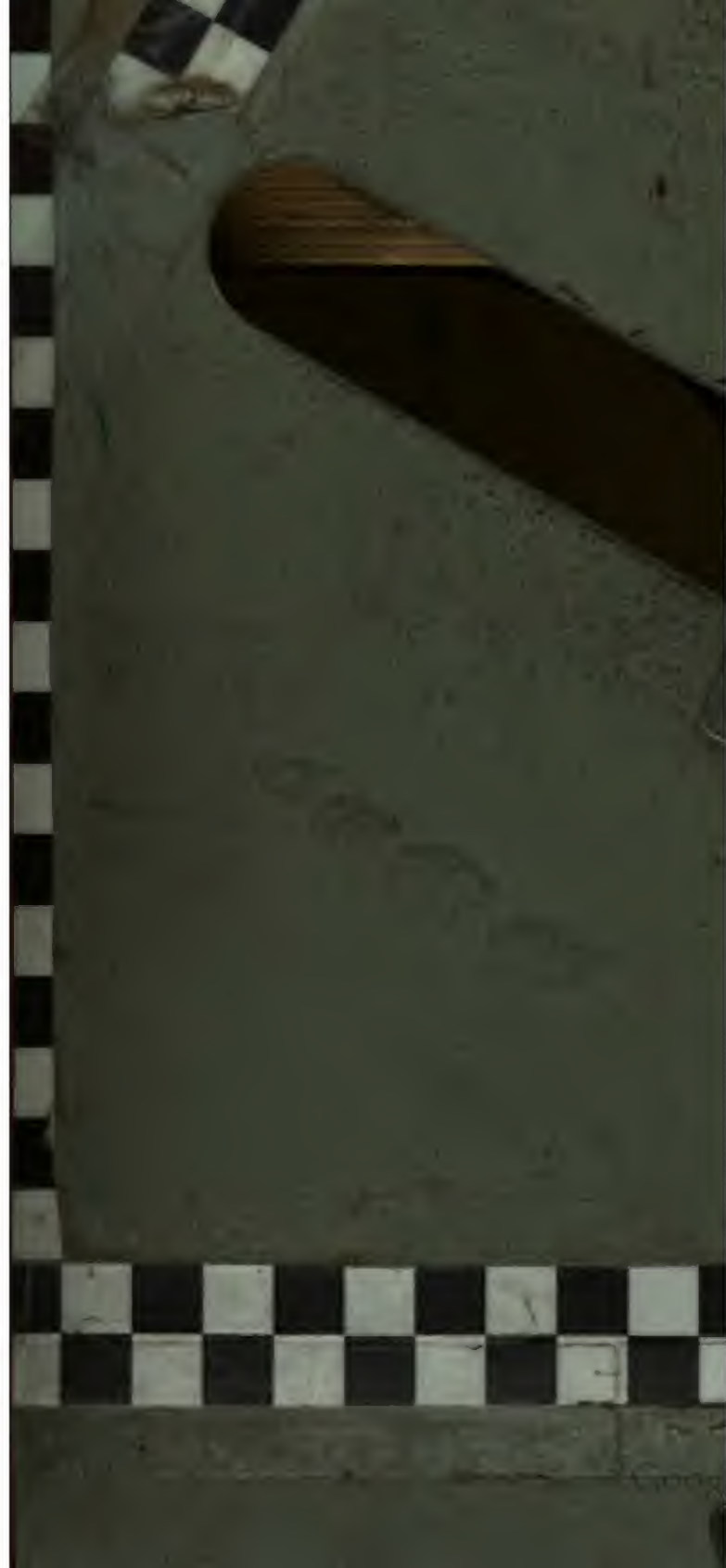
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June 21

UNITED STATES CIRCUIT COURTS OF APPEALS REPORTS

WITH ANNOTATIONS

WITH TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS WHICH
HAVE BEEN PASSED UPON BY THE SUPREME COURT OF THE UNITED STATES, AND
TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS
IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED.

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OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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¹ Died May 3, 1904.

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² Appointed in accordance with an act of Congress providing for an additional District Judge for this District.

³ Died April 25, 1904.

⁴ Appointed to succeed Simonton, Circuit Judge.

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* Appointed to succeed Judge Shiras.

* Resigned.

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS.

(128 Fed. 1.)

LOUISVILLE & N. R. CO. v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1904.)

No. 1,268.

1. RAILROADS—RIGHT OF WAY—EASEMENT BY PRESCRIPTION.

Where a railroad company has the charter power to acquire a right of way for railroad purposes, and it enters upon lands with the consent or license of the owner, and builds its railroad, expending money in the prosecution of the work, and holds it continuously for a period of more than 40 years, running trains over it daily, and exercising the acts of ownership that are necessary to keep the roadbed in proper condition during all that time, it acquires a right of way by prescription.

2. INJUNCTION—GROUNDS—PROTECTION OF EASEMENT.

Equity has jurisdiction by injunction to prevent interference with easements or their destruction, and a bill by a railroad company against a number of defendants, alleging that as owners of lands through which its road runs they are interfering with its right of way, denying its right to the same, threatening suits, and preventing it from keeping its roadbed in repair, states a cause of action for equitable relief.

3. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—HOW DETERMINED.

In a suit by a railroad company in a federal court against a number of landowners to enjoin threatened interference with its use of its right of way through their lands the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constitutes the value in controversy for jurisdictional purposes.

4. PARTIES—JOINDER OF DEFENDANTS—SUIT TO ENJOIN INTERFERENCE WITH EASEMENT.

Different landowners may be joined as defendants in a single suit by a railroad company to enjoin interference with its use of its right of way and with the maintenance of its track, where the right asserted is the same against each defendant.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

¶ 1. See Railroads, vol. 41, Cent. Dig. § 142, and note at end of case.

¶ 3. Jurisdiction of circuit courts as determined by the amount in controversy, see notes to 19 C. C. A. 75, 36 C. C. A. 459.

The appellant, a Kentucky corporation (complainant below), brought this suit against Mrs. M. E. Smith and 14 others, appellees (defendants below), all citizens of Alabama. The averments and purpose of the bill are sufficiently shown in the opinion. The defendants demurred to the bill, making the objections which are stated and discussed in the opinion. The circuit court sustained the demurrers and dismissed the bill, and its decision and decree are assigned as error.

John W. Judd (John B. Keeble and Chas. B. Stark, on the brief), for appellant.

W. R. Walker (Thomas C. McClellan, on the brief), for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. 1. It is shown by the bill that on December 19, 1853, the Legislature of Alabama passed "An act to incorporate the Tennessee and Alabama Central Railroad Company." Acts 1853-54, p. 298. The act provided that the railroad to be built should extend from Montevallo, in Shelby county, Ala., through the town of Decatur, crossing the Tennessee river; thence through Limestone county to some point on the boundary line between Alabama and Tennessee, and there to connect with other railroads. The charter authorized the company to contract for and receive conveyances for the right of way not to exceed 150 feet wide, and for the material necessary to build the road. It also made provision for the condemnation of the right of way where it could not be contracted for. Work began on the building of the road in 1856 or 1857, and it was finished through Limestone county to the Tennessee line in the year 1859. It is alleged on information and belief that the railroad company either acquired the right of way upon and through the defendants' lands under provision of the charter, or that it acquired such right by "let" and license of the owners through whose lands the railroad was constructed. After the completion of the road through Limestone county, and through the lands now owned by the defendants, its operation was begun in the year 1859, and it has since been continuously operated by the complainant, and those under whom it claims, up to the time of the filing of the bill. It is alleged that since July 1, 1872, and up to the present time, the complainant has claimed, owned, held, operated, and maintained the railroad continuously without hindrance from any one, and that it is now holding, maintaining, operating, and claiming to own and operate it. These averments are emphasized in an amendment to the bill, in which it is averred that the right of way in question is continuous, extending through Limestone county, a distance of 26 miles, and was acquired and taken possession of more than 40 years ago, and that the complainant and those under whom it holds "has claimed, used, occupied, and been in possession of said right of way all this time, continuously running its trains over the same, and continuously, wherever necessary, building switches and turnouts, ditching, grading, and doing all manner of work necessary to keep its roadbed and right of way in suitable condition and repair for the safe operation of its trains, both freight and passenger, and this use of said right of way has never been questioned or denied until the interference by the defendants." We think these

averments are sufficient to show that the complainant has acquired an easement or right of way across the lands in question. In Alabama an action to recover lands, tenements, or hereditaments is barred by the statute of limitation of 10 years. Code Ala. 1896, § 2795. The ancient doctrine of prescription required a use from time immemorial. But now, in most jurisdictions (and certainly in Alabama) the prescriptive period is the same as the local statute of limitations for quieting titles to land. *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412. Where a railroad company has the charter power to acquire a right of way for railroad purposes, and it enters upon the lands of the owner, with his consent or license, and builds its railroad, expending money in the prosecution of the work, and holds it continually for a period of more than 40 years, running trains over it daily, and exercising the acts of ownership that are necessary to keep the roadbed in proper condition during all that time, it acquires by prescription a right of way. *Texas & Pacific Railroad v. Scott*, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94; *National Water Works v. Kansas City (C. C.)* 65 Fed. 691; *Cogsbill v. Mobile & Girard Railroad*, 92 Ala. 252, 9 South 512; *Midland Ry. v. Smith*, 113 Ind. 233, 15 N. E. 256.

2. It is unquestionably settled that equity has jurisdiction by injunction to prevent the interference with easements or their disturbance or destruction, actual or threatened. This doctrine has been applied in a great variety of cases, such as preventing the diversion of water, preventing the obstruction of a private right of way, preventing the pollution of a stream, preventing the obstruction of a public right of way, etc., and (in *Cairo V. & C. Railroad v. Brevoort [C. C.]* 62 Fed. 129, 135, 25 L. R. A. 527) in the prevention of obstructions or interference with a railroad's right of way. Every disturbance of an easement, actual or threatened, will be restrained whenever, from the essential nature of the injury or from its continuous character, the legal remedy is inadequate. *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Hacke's Appeal*, 101 Pa. 245; *Gardner v. Trustees*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; *Russell v. Napier*, 80 Ga. 77, 4 S. E. 857; *Nashville, etc., Railroad v. M'Connell (C. C.)* 82 Fed. 65; 3 Pom. Eq. Jur. (2d Ed.) § 1351, and notes. It is shown by the bill that the defendants are denying the right of the complainant to the right of way, and are insisting upon their right to cultivate the lands up to the ends of the cross-ties of the complainant's roadbed and track, and are denying the complainant the right to go upon the lands included in its right of way for the purpose of reconstructing its roadbed and banks and cutting or repairing ditches therein as the same are needed in the proper maintenance and operation of the road. The complainant has been warned by the defendants not to do the work necessary on the right of way to keep the same in proper condition, and other wrongs and threatened wrongs are alleged in the bill; and it is then stated:

"The action of the defendants is such that the complainant is unable to keep and maintain its track and roadbed in proper and safe condition so as to suitably and safely operate its trains. That said defendants are continually threatening this complainant and its employes with suits, both civil and criminal, for entering upon its right of way contiguous to their land in the performance of the work necessary to be done in the maintenance and operation of the road."

These averments, taken in connection with the others in the bill, are amply sufficient to give a court of equity jurisdiction to protect the alleged rights of the complainant. *Jones on Easements*, § 879 et seq.

3. The defendants contend that it does not appear from the bill that the suit involves property exceeding \$2,000 in value, and that, therefore, the circuit court was without jurisdiction. The bill shows that the complainant is the owner of a railroad known as the Nashville & Decatur Railroad, 119 miles long, extending from Nashville, Tenn., to a junction with the Southern Railway near Decatur, Ala., including the roadbed, tracks, switches, side tracks, rails, ties, bridges, etc. The exhibits to the bill showing rental values for long terms of years, and amount of taxes paid, show that the entire railroad is of great value, worth several millions of dollars. The railroad runs through Limestone county, Ala., a distance of 26 miles, and for a distance of about 20,000 feet through lands in that county which are owned in separate tracts by the defendants. It is averred that for the last 45 years the complainant and those under whom it claims has used the track, and is now using it, by running trains of cars over it. The complainant asserts the right to continue so to use the road, and claims that its right of way is 150 feet wide—75 feet on each side from the center of its track. The purpose of the bill is to protect the complainant in the use of this right of way against the unlawful interference of the defendants. The property claimed by the complainant in the bill is an easement or right of way. The easement extends from one end of its road to the other. After stating these facts, the complainant alleges that "the value of the property, as mentioned in this bill as claimed by it, and which is in controversy in this suit, exceeds the sum and value of \$2,000, exclusive of interest and costs." The construction placed on the bill by appellees' counsel can be best shown by a sentence from their argument: "Plaintiff cannot join in a single suit in a federal court claims against several parties, and sustain the jurisdiction of the court by reason of the fact that the total amount involved exceeds the amount necessary to give the court jurisdiction." The railroad, as we have said, passes through the different tracts of defendants' lands for about 20,000 feet, varying in length through the separate tracts from 200 feet to 4,150 feet. The learned counsel for the appellees evidently construes the bill as involving, as to amount, not more than the value of a strip of land 150 feet wide across the respective tracts of the defendants. And, placing that construction on the bill, it is argued that the value of the several strips across the several tracts cannot all be added together to make the jurisdictional amount. If that construction of the bill were correct, unless the value of the strip on each defendant's land exceeded \$2,000, the court would be without jurisdiction, for it has been often held that distinct claims against several defendants cannot be united to make up the amount necessary to give the court jurisdiction. *Walter v. Northeastern Railroad*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. Ed. 1044; *Russell v. Stansell*, 105 U. S. 303, 26 L. Ed. 989; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083; *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552;

Seaver v. Bigelow, 72 U. S. 208, 18 L. Ed. 595. But the bill in this case does not assert distinct claims against several persons, and seek to aggregate them to make up the jurisdictional amount; nor is it a suit to condemn or appropriate a right of way across defendants' lands. It is specifically alleged that the plaintiff many years ago "acquired and now holds" the right of way as a perpetual easement. The property involved, and which the complainant seeks to protect, is the easement or right of way acquired many years ago—the right to run its trains along its railway. The value of the thing involved in this suit cannot be ascertained by aggregating the value of the several strips of land covered by the right of way across the tracts owned by the defendants. That becomes clear when we consider that one defendant—the one whose land on one side joins the right of way for only 200 feet—can damage the complainant as much by obstructing its right of way as all of the defendants owning the other 19,800 feet. A permanent impediment on 10 feet of the road would be as injurious and disastrous to complainant's rights as an impediment on 10 miles of it. When the pleader says that the "property claimed by it" and "which is involved in this suit" is worth more than \$2,000, he means, not that several and distinct claims against the several defendants are to be valued and added together, but it means the one indivisible right to run its trains on its right of way. That is the right it seeks to protect by its suit praying for an injunction. In a suit to abate a railroad bridge as a nuisance the Supreme Court held that the value of the right to maintain the bridge, and not the amount of complainant's damage, determines the jurisdiction of the court. The question was disposed of with much brevity:

"But the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern." *Mississippi, etc., Railroad v. Ward*, 67 U. S. 485, 492, 17 L. Ed. 311.

In an injunction suit by a railroad company to maintain its scheduled rate against attack by numerous actions in state courts it was held by this court, citing the case last quoted, that the amount in dispute was the value of the object to be gained by the bill. *T. & P. Railway v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503. The same principle has been announced in other cases. *Whitman v. Hubbell* (C. C.) 30 Fed. 81; *Smith v. Bivens* (C. C.) 56 Fed. 352; *Humes v. City of Fort Smith* (C. C.) 93 Fed. 857; *Nashville, etc., Railroad v. McConnell* (C. C.) 82 Fed. 65. In a case where the plaintiff sought an injunction against several defendants diverting water from a river, it was held that it need not appear that the amount involved as to each defendant exceeded \$2,000. The matter involved was the injury to the plaintiff's property. If the injury sought to be enjoined was of the jurisdictional amount, that was sufficient. *Pacific Live Stock Co. v. Hanley et al.* (C. C.) 98 Fed. 327. A recent decision of the Supreme Court sustains this view. The plaintiff was a dealer in imported liquors. The defendants—several constables—threatened to seize and destroy all liquor imported by him into the state. Objection was made to the plaintiff's bill on the ground that the value in controversy did not exceed the sum of \$2,000. The record showed that he intended to import liquors of a value ex-

ceeding that sum, and that the right to deal in such liquors was of a greater value than \$2,000. This appears in evidence by an agreed statement. The court held that:

"Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of two thousand dollars. Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail." *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648.

It must be remembered, too, that this question is before us on demurrer, and that the value is not liquidated or fixed by law. The alleged value, therefore, must govern. *Texas & Pacific Ry. v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503. Taking the averments of the bill as true, as we must do on demurrer, we think it is shown that the value of the right involved in the suit is sufficient to confer jurisdiction.

4. The appellees contend that there is a misjoinder of parties defendant. There has been much controversy in recent years as to the circumstances under which a plaintiff may join many defendants in a suit in equity to prevent a multiplicity of suits. Some courts have held that Mr. Pomeroy (1 Pom. Eq. Jur. §§ 245-273) has unduly enlarged the rule. *Tribette v. Railroad Company*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642; *Turner v. Mobile*, 135 Ala. 73, 33 South. 132. But there are other authorities that fully indorse the views of the text-writer. *Harlan*, Circuit Justice, in *Osborne v. Wisconsin Railway Co.* (C. C.) 43 Fed. 825; *De Forest v. Thompson* (C. C.) 40 Fed. 375; *Ritchie v. Sayers* (C. C.) 100 Fed. 520; *Keese v. City of Denver*, 10 Colo. 113, 15 Pac. 825; *Carlton v. Newman*, 77 Me. 408, 1 Atl. 194. If the position taken by Pomeroy and the authorities last cited be correct, there is no misjoinder of parties defendant, because equity would have jurisdiction of the case on the sole ground of preventing a multiplicity of suits. But in this case we are not required to take either side in that controversy. Here the jurisdiction in equity, as we have seen, is not dependent alone on preventing a multiplicity of suits. There are other and distinct grounds for equitable interference. The complainant seeks by injunction to prevent an obstruction to and interference with its right of way under circumstances, as we have shown, that confer equity jurisdiction from the inherent nature of the case, aside from the fact that the interposition of the equity court may prevent a multiplicity of suits. As to the alleged misjoinder of the defendants, the question here is, when may defendants be joined in a suit by a complainant, the bill stating other grounds for equitable interference, and not depending for its equity on the doctrine of preventing a multiplicity of suits? The rule, we think, is plain that when the matter in litigation is entire in itself, and does not consist of separate things, having no connection with one another, it is not necessary that each defendant should have an interest in the suit coextensive with the claim set up by the bill. He may have an interest in a part of the matter in litigation instead of the whole. There can be no reason why one complainant, who has the same right against a number of persons—that right being such that it confers equity jurisdic-

tion—may not have that right determined as to all the parties interested by one suit. The plaintiff's claim is an entirety. It is a suit to protect a single indivisible right of way. The right claimed is exactly the same against each one of the defendants. All of the defendants are interfering in the same manner with the same right of way. As the case is one on the averments of the bill within the jurisdiction of a court of equity, there can be no reason for requiring the complainant to file 15 bills, one against each defendant. It is no objection that the several defendants each have a right to make a separate defense against the claim of the complainant, provided the complainant's assertion of right is the same against each, and there is only one general question to be settled, which pervades the whole case. It is enough if the purpose of the bill is to establish a single right between the complainant and the several defendants. *Hyman v. Wheeler* (C. C.) 33 Fed. 629; *Pacific Live Stock Co. v. Hanley et al.* (C. C.) 98 Fed. 327; *Smith v. Bivens* (C. C.) 56 Fed. 352; *Nashville, etc., Railroad v. McConnell* (C. C.) 82 Fed. 65; *Union Mill & Mining Co. v. Dangberg* (C. C.) 81 Fed. 73; *Pillsbury-Washburn Mills v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Prentice v. Duluth Forwarding Co.*, 58 Fed. 437, 7 C. C. A. 293; *Sang Lung v. Jackson* (C. C.) 85 Fed. 502; *American Central Ins. v. Landau*, 56 N. J. Eq. 513, 39 Atl. 400; *Cadigan v. Brown*, 120 Mass. 493; *Kerr on Injunctions* (Ed. 1880) 522.

We do not deem it necessary at this time to decide other questions. The complainant contends that the width of the right of way should be fixed at 150 feet, the charter of the company having authorized the obtaining of a right of way of that width. The defendants assert that a right of way acquired by prescription does not exceed in width the land occupied and used as a right of way. Clearly, this question, though elaborately argued here, is not necessarily involved in a decision of the demurrers, which are addressed to the whole bill.

The decree of the circuit court is reversed, and the cause remanded, with instructions to overrule the demurrers.

NOTE.

Acquisition or Loss of Right to Railroad Right of Way by Prescription.

I. IN GENERAL.

[a] (U. S. 1896) In 1856, S. made a verbal contract with a railway company to give it a right of way over his land if the company would establish a depot at a certain point on such land. The railroad was built on the land, and the depot established and maintained for 36 years, during which also the railway company, and another company with which it was consolidated, and which succeeded to its rights, continued to use the track built on S.'s land in the usual manner, without controversy or dispute as to their right. *Held*, that the contract between S. and the railway company being void under the statute of frauds, and the right of action to recover the right of way occupied by the railway company, or its value, having accrued at once, the railway company's possession during the 36 years had been adverse, and it had acquired, by limitation and prescription, the right to an easement in the land.—*Texas & P. Ry. Co. v. Scott*, 77 Fed. 728, 23 C. C. A. 424.

[b] (U. S. 1885) Where a railroad company enters upon land under color of title, and constructs its road across it, and remains in uninterrupted possession for more than 10 years, a suit for compensation for the right of way either by the original owner of the property, or by one who has purchased with notice

that the road is in possession, will be barred by the statute of limitations.—*Blair v. St. Louis, H. & K. R. Co.* (C. C.) 24 Fed. 539.

[c] (Ill. 1881) A railroad holding under a deed which conveys a use of so much of a street as may be necessary cannot be regarded as holding the entire street adversely to the public.—*Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157.

[d] (Ill. 1896) The effect of payment by a railroad, having color of title to a right of way through a section of land, of taxes assessed on the strip as a railroad track, is not avoided by prior payment by the paramount owner of taxes on the section, and the taking of a receipt for payment on the entire section, he in fact having paid no taxes on the part occupied by the railroad.—*St. Louis, I. & E. R. Co. v. Warfel*, 45 N. E. 169, 163 Ill. 641.

[e] (Ill. 1897) Where a strip of land condemned for a right of way was left uninclosed, and was claimed and used by the former owner and his grantees for more than 20 years, the right of the railroad company therein was barred by limitation.—*Donahue v. Illinois Cent. R. Co.*, 46 N. E. 714, 165 Ill. 640.

[f] (Ill. 1897) A subsequent inclosure of land condemned for a right of way by a railroad company, and possession for seven years, will not give it title, under *Hurd's Rev. St. c. 83, § 6*, which provides that seven years' actual possession of land under claim and color of title made in good faith, and payment of taxes, shall create ownership, where it is not shown that the company listed the property for taxation, as required by its charter, and in which way only its property is taxable, but the land was taxed locally as a part of lots into which it had been subdivided, with contiguous property, and such taxes had been paid by another, claiming title under the original owner.—*Donahue v. Illinois Cent. R. Co.*, 46 N. E. 714, 165 Ill. 640.

[g] (Ill. 1897) A railroad company which has occupied land as right of way, under a conveyance taken in good faith, for more than seven years, during which time it has kept it inclosed by fence, and has paid all taxes legally assessed against it, is the legal owner, under 2 *Starr & C. Ann. St. p. 1539, § 6*, to the extent and purport of its paper title.—*Chicago, M. & St. P. Ry. Co. v. Grant*, 47 N. E. 760, 167 Ill. 489.

[h] (Ind. 1900) A railway company's construction of its tracks in a street, and their continued and peaceable use for 30 years with the knowledge and acquiescence of the municipality, raise a conclusive presumption of a grant.—*Town of Newcastle v. Lake Erie & W. R. Co.*, 57 N. E. 516, 155 Ind. 18.

[i] (Ky. 1897) A railroad company, in 1853, obtained a deed from an owner of land granting a right of way, though neither the land nor right of way was described in the deed. The construction of the road was thereafter suspended, no work having been done on land of the grantor beyond surveying and staking the line. The land was sold, without any reservation of the right of way, in 1858; and the purchaser and his grantees inclosed and occupied the entire tract until 1886, when defendant railroad company, as successor of the one first named, constructed its road over the land. *Held*, that the making of a survey across the land by the railroad company in 1872, and the sending of a man to take possession of the right of way in 1877, which he did by walking over it, were not sufficient to establish re-entry, as against the continued and actual adverse possession of the occupants.—*Maysville & B. S. R. Co. v. Holton* (Ky.) 39 S. W. 27.

[j] (Ky. 1900) Defendant railroad company having been in the adverse possession of a right of way through plaintiff's land for more than 20 years, plaintiff cannot question the validity of its title thereto.—*Fortune v. Chesapeake & O. Ry. Co.*, 58 S. W. 711, 22 Ky. Law Rep. 749.

[k] (Mo. 1885) A railroad company, by 10 years' adverse occupancy and use of a strip of ground, may acquire an easement therein.—*Welsh v. Chicago, B. & K. C. Ry. Co.*, 19 Mo. App. 127.

[l] (Mo. 1898) The fact that a railroad company had used certain land without authority for a less time than the period of limitations does not render an entry by its grantee without the consent of the owner legal.—*Ragan v. Kansas City & S. E. R. Co.*, 46 S. W. 602, 144 Mo. 623.

[m] (N. Y. 1890) Where the right of way of a railroad company expires with the life of the corporation, and the original company was dissolved by merger into a new company, which has operated the road for more than 20 years, the

new company acquires the right of way by adverse possession and user. 46 Hun, 612 (1887), affirmed.—*Miner v. New York Cent. & H. R. R. Co.*, 123 N. Y. 242, 25 N. E. 339.

[n] (N. Y. 1898) The defendant (a railroad company), before exercising its authority to lay its tracks along a proposed avenue, procured from the former owner of the land, who had already conveyed the same to the city, a deed purporting to convey a strip along the middle thereof to the company. The owner had already conveyed the abutting land to plaintiff's predecessor in title. The company then constructed on the strip, with permission of the authorities, an embankment, which for more than 20 years, and up to 1853, it occupied for the operation of its railroad. *Held*, that its claim had ripened into a title by adverse possession, as against the abutting owner, in so far as it had occupied the land up to that time.—*Taylor v. New York & H. R. R. Co.*, 50 N. Y. Supp. 697, 27 App. Div. 190.

[o] (N. Y. 1898) In 1872 the Legislature required a change of grade, and authorized a change in the width and height of the embankment,—a change completed in 1875; and the embankment continued to exist without objection, except as subsequently increased in height, and to be used for the operation of the road, for more than 20 years. *Held*, that thereby the company acquired by adverse possession the right to maintain it to the extent to which it was used during that time.—*Taylor v. New York & H. R. R. Co.*, 50 N. Y. Supp. 697, 27 App. Div. 190.

[p] (N. Y. 1900) A railroad company, in constructing its railroad in a certain street, first made in front of plaintiff's property an embankment, 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. Later, by statute, the embankment was converted into a viaduct, 56 feet wide and 7 feet high, in front of this particular property. This use of the property had continued for over 20 years, within the knowledge of plaintiff and her grantors. *Held* to constitute a right by prescription to the encroachment of light and air, to the extent of the user. Judgment (1899) 57 N. Y. Supp. 1053, 40 App. Div. 343, affirmed.—*Lewis v. New York & H. R. R. Co.*, 56 N. E. 540, 162 N. Y. 202.

[q] (N. C. 1898) A railroad company cannot obtain title to a right of way over land by prescription, since it can obtain such easement through the exercise of its right of eminent domain, without the owner's grant or consent.—*Narron v. Wilmington & W. R. Co.*, 29 S. E. 356, 122 N. C. 856, 40 L. R. A. 415.

[r] (Pa. 1903) Where a railroad, having the right to exercise eminent domain, took land as a purchaser from one holding adverse possession, its title became good when the combined adverse possession of the railroad company and its grantor exceeded 21 years.—*Covert v. Pittsburg & W. Ry. Co.*, 54 Atl. 170, 204 Pa. 341.

[s] (Tex. 1894) Adverse possession and continuous use by a railway company of a strip of land for 18 years, as a right of way for the operation of its trains, creates an easement by prescription.—*Texas & P. Ry. Co. v. Gaines* (Civ. App.) 27 S. W. 266.

[t] (Tex. 1902) In 1877 the city council of San Antonio enacted an ordinance granting to defendant, for railroad purposes, the occupation of a tract of land belonging to the city, which tract had been granted to the city's predecessor by Spain for a common. Thereafter, in the same year, the council directed that the proceeds from the sales of the city's public lands should be used for school purposes. The city had then assumed control of the schools, and continued to do so, through its mayor and council, until 1900, when a board of trustees was provided for. Defendant, acting under the ordinance, took possession of the land, and continued in its peaceable possession for over 20 years. *Held*, that the railroad company acquired an easement in said land as against the city and the school board.—*Board of School Trustees of City of San Antonio v. Galveston, H. & S. A. Ry. Co.*, 67 S. W. 147.

[u] (Tex. 1902) The board of trustees for the schools, succeeding to the authority of the mayor and council in the management of the school affairs, was guilty of laches in permitting defendant to remain in the undisturbed possession of the land; and the perfection of the easement as against the city, the legal owner of the property, was gained irrespective of the destination of the proceeds from the sale of the land.—*Board of School Trustees of City of San Antonio v. Galveston, H. & S. A. Ry. Co.*, 67 S. W. 147.

II. CLAIM OR COLOR OF TITLE UNDER WHICH ENTRY IS MADE.

[a] (U. S. 1887) Section 2186, Gen. St. Colo., provides, *inter alia*, "that every person in the peaceable and undisputed possession of lands or tenements, under claim and color of title made in good faith, who shall for five successive years hereafter continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her proper title." *Held*, that this provision will protect the title of a railroad company to a right of way taken and used as an easement, upon compliance with its conditions, although the condemnation proceedings were invalid for want of sufficient notice, and the owner of the fee was not estopped, by any knowledge of the occupancy, from maintaining an action of ejectment.—*Keener v. Union Pac. Ry. Co.*, 31 Fed. 126.

[b] (Ala. 1888) Proceedings for condemnation of land instituted by a railroad company in the commissioners' court, even though invalid for irregularities of procedure, constituted color of title, under which the company could adversely hold the premises.—*Mobile & G. R. Co. v. Cogsbill*, 85 Ala. 456, 5 South. 188.

[c] (Ind. 1891) Where streets have been dedicated subject to a railroad right of way, a deed by the donor to the railroad company, granting the free use and occupancy of the streets "for such tracks, side tracks, switches, and turns as said company by its directors may think proper," gives color of title to the company, and its possession by the laying of one track is sufficient to preserve its right to lay the additional tracks whenever it sees proper.—*City of Noblesville v. Lake Erie & W. Ry. Co.*, 130 Ind. 1, 29 N. E. 484.

[d] (Pa. 1901) A railroad company, which takes a deed of land for its right of way from a mere trespasser, cannot tack its possession of an easement thus acquired to the trespasser's previous possession, in order to make title under the statute.—*Covert v. Pittsburg & W. Ry. Co.*, 18 Pa. Super. Ct. 541.

[e] (Tex. 1892) A railroad company which enters on another's land as a trespasser, and constructs and operates its road thereon, cannot acquire title to the fee by adverse possession, since its possession and claim is only of an easement for its right of way.—*Texas W. Ry. Co. v. Wilson*, 83 Tex. 153, 18 S. W. 325.

III. ADVERSE AND EXCLUSIVE CHARACTER OF CLAIM.

[a] (U. S. 1899) In 1849 the city of Cleveland granted to certain railroads the right to use a portion of a tract of land claimed as a street. Not long afterwards, in a suit against the railroads by an adverse claimant, defendants alleged their interest in the land to be that of licensee of the city, and successfully defended on the city's title under a prior dedication. *Held* that, on ejectment by the city to recover possession of such streets, the railroad companies could not successfully plead limitation, whatever may be the true construction of the contract under which they took possession, or the nature of their rights otherwise acquired, as by their own admission, in a sworn pleading, their holding was not adverse to the city, and it had the right to rely on such admission until notified that they claimed under a different tenure.—*City of Cleveland v. Cleveland, C., C. & St. L. Ry. Co.*, 93 Fed. 113.

[b] (Ind. 1874) The ordinary use of a street by a railroad company, for its track and trains, being a use as a way only, can never, by any lapse of time, and even though continuous and exclusive, ripen into a title to the fee of the strip of land used. For it to gain such title upon the principles of adverse possession, it must appear that it occupied the land under a claim of ownership of the soil, and adversely to the use of it by the public as a street.—*Indianapolis, P. & C. R. Co. v. Ross*, 47 Ind. 25.

[c] (Minn. 1892) The possession of a portion of a street by a railroad company entering under authority given by its charter is not adverse to the public, where there is no exclusion of the public use.—*Village of Wayzata v. Great Northern Ry. Co.*, 50 Minn. 438, 52 N. W. 913.

[d] (Minn. 1898) The mere construction, maintenance, and occasional use by a railroad company (which has no conveyance of the land) of an ordinary railroad track across a platted street while it still remains unimproved and

unfit for public use, and before public convenience or necessity requires it to be opened and improved for use as a street, does not constitute adverse possession, as against the public. Such occupancy must be presumed to be subject to the paramount right of the public.—*St. Paul & D. R. Co. v. City of Duluth*, 76 N. W. 35, 73 Minn. 270, 43 L. R. A. 433.

[e] (Miss. 1901) The use and occupation of a strip of land by a railroad company in the same manner and to the same extent as other unfenced parts of its road and right of way constitutes actual and exclusive possession, and, if continued for 10 years, is sufficient to confer title by prescription.—*Sproule v. Alabama & V. Ry. Co.*, 29 South. 163, 78 Miss. 88.

[f] (Mo. 1896) An elevator company, by laying a track on a public levee to connect with a railroad, and by using the same 10 to 14 years, does not exercise such an exclusive and adverse use as to confer on it the exclusive right to the part of the levee occupied by the track.—*Union Elevator Co. v. Kansas City Suburban Belt Ry. Co.*, 36 S. W. 1071, 135 Mo. 353.

[g] (Neb. 1892) A railroad company's possession is not adverse where both prior and subsequent to its entering it attempted to condemn the land, such efforts being a recognition of the owner's title. *Hull v. Chicago, B. & Q. R. Co.* (1887) 21 Neb. 371, 32 N. W. 162, and *Id.* (1888) 24 Neb. 740, 40 N. W. 280, followed.—*Nebraska Ry. Co. v. Culver*, 35 Neb. 143, 52 N. W. 886.

[h] (N. Y. 1891) In an action against an elevated railroad company for injury to a lot abutting on the street on which the road runs, the company pleaded title by prescription. The evidence showed that the original entry upon the street was merely experimental; that, during the 20-years possession relied on to establish the title, the road had been changed from a cable road to a steam railroad; that the original possession was taken when both parties were ignorant that the maintenance of the road interfered with the rights of the owners of abutting property; and that, after the expiration of said 20 years, the company instituted proceedings to condemn the lot owner's street rights. *Held*, that the evidence justified a finding that the company's possession was not adverse to the lot owner. 59 N. Y. Super. Ct. (27 Jones & S.) 175, 13 N. Y. Supp. 626, modified.—*American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252, 29 N. E. 302.

[i] (N. Y. 1891) The possession of a street by an elevated railroad company under a charter which provides that any private property used or acquired shall be compensated for by the company is not necessarily subordinate to the street rights of the owners of abutting property. 59 N. Y. Super. Ct. (27 Jones & S.) 175, 13 N. Y. Supp. 626, modified.—*American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252, 29 N. E. 302.

[j] (N. Y. 1900) Defendant and its predecessors in interest for a long time had occupied with tracks the city street on which plaintiff's lot was situated, plaintiff owning the fee to the middle of the street. No compensation was ever made to plaintiff for the use of the street, nor was the right to such use ever acquired from plaintiff. Defendant's entry on the street was under a license from the city, and there was no evidence that any claim was ever made of any rights in the street, except under such license. *Held*, that such occupation was not adverse to the plaintiff.—*Monohan v. New York Cent. & H. R. R. Co.*, 66 N. Y. Supp. 37, 31 Misc. Rep. 619; *Thoman v. Same*, *Id.*

[k] (N. Y. 1903) An abutting owner sued an elevated road for damages to his easements of light and access, and proved that during the 20 years of its occupation the railroad company had admitted in its petition for correction of its franchise taxes that it must pay damages to abutting owners for their consent to its maintenance, and that it had settled with many of the abutting owners in plaintiff's neighborhood. *Held*, that such testimony was sufficient to defeat the claim of the railroad to have acquired the easements by adverse possession.—*Hindley v. Metropolitan Elevated Ry. Co.*, 85 N. Y. Supp. 561, 42 Misc. Rep. 56.

[l] (Or. 1904) A railroad company which enters and occupies a strip of land under permission of a municipality cannot thereafter claim that its occupancy was adverse.—*Oregon City v. Oregon & C. R. Co.*, 74 Pac. 924.

[m] (Tenn. 1900) Occupation of right of way by the owner of the fee, so long as it is not required for railroad purposes, is not adverse, so as to start

the statute of limitations running against the railroad company.—*Mobile & O. R. Co. v. Donovan*, 58 S. W. 309, 104 Tenn. 465.

[n] (Tex. 1892) In an action to recover land used for more than 10 years by a railroad company as a right of way, testimony by one of the directors of the road that the company entered on the land expecting to pay for the right of way when called on by the owner is insufficient to show an intent to prescribe for an easement under a claim of right in the company, independent of and antagonistic to the owner of the land; and a finding by the court below that the company had failed to acquire an easement by prescription will not be disturbed.—*Texas W. Ry. Co. v. Wilson*, 83 Tex. 153, 18 S. W. 325.

[o] (Tex. 1893) Parol evidence of a former owner, showing a verbal gift of land to a railroad for right of way, although not admissible to establish an easement therein, is admissible for the purpose of showing that the possession of the railroad was adverse.—*Shepard v. Galveston, H. & H. R. Co.*, 2 Tex. Civ. App. 535, 22 S. W. 267.

[p] (Tex. 1893) Possession by a railroad, under a verbal gift of a right of way, is sufficiently adverse to set in motion the statute of limitations.—*Shepard v. Galveston, H. & H. R. Co.*, 2 Tex. Civ. App. 535, 22 S. W. 267.

IV. CONTINUITY OF OCCUPANCY AND ADVERSE CLAIM.

[a] (Minn. 1895) A petition by a railroad company to the city council for the vacation of certain streets and parts of a levee held by the company adversely to the city is such a recognition of the rights of the city in the property as to break the continuity of the adverse claim.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458.

[b] (Neb. 1887) In ejectment against a railroad company for real estate occupied by it as a part of its right of way, the company pleaded the statute of limitations. Within the 10 years last preceding the commencement of the action the railroad company sought to condemn the property to its use under the provisions of the statute. These proceedings were instituted against the real owner by name, and the condemnation money deposited with the county judge for him. *Held*, that these proceedings amounted to a recognition of the ownership of the person against whom they were instituted, and would arrest the running of the statute, even though the proceedings themselves were void for want of jurisdiction.—*Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371, 32 N. W. 162.

[c] (N. Y. 1901) A suit begun by the owner of property abutting a street partly occupied by a railroad, to restrain an unlawful user of the street by the railroad company, which suit was discontinued, is not a disturbance of the railroad's user as then established sufficient to break it.—*Campbell v. New York & H. R. Co.*, 71 N. Y. Supp. 1105, 35 Misc. Rep. 497.

[d] (N. Y. 1903) In an action by an abutting owner against an elevated railroad company for injuries to his easements of light and air, where defendant alleges adverse possession, a contention that the company's user was not continuous because during it the company was for some months in the hands of a receiver is not tenable.—*Hindley v. Metropolitan Elevated Ry. Co.*, 85 N. Y. Supp. 561, 42 Misc. Rep. 56.

[e] (N. Y. 1903) An elevated company's adverse user as against abutting owners is not interrupted by alterations made by the company in the elevated structure necessitated by the continuance of the original use.—*Hindley v. Metropolitan Elevated Ry. Co.*, 85 N. Y. Supp. 561, 42 Misc. Rep. 56.

[f] (Tex. 1892) In an action to recover land used by a railroad company as a right of way, evidence that more than 10 years before the suit was brought the company entered on the land, constructed its railroad, and began to operate its trains, is insufficient to show a prescriptive right in the railroad company to the easement, since such evidence does not show a continuous exercise and enjoyment of the right of way during the 10 years.—*Texas W. Ry. Co. v. Wilson*, 83 Tex. 153, 18 S. W. 325.

V. EXTENT OF RIGHTS ACQUIRED.

[a] (Ala. 1890) Where, in ejectment against a railroad company, defendant claims by adverse possession under color of title, consisting of defective con-

demnation proceedings, actual possession of a part of the tract is to be regarded as actual possession of the entire tract described in the condemnation proceedings; and this, though plaintiff was not paid for the land, and had no notice of the proceedings.—*Cogsbill v. Mobile & G. R. Co.*, 92 Ala. 252, 9 South. 512.

[b] (Colo. 1898) Occupancy of land by a railroad company, confined to the laying and use of its tracks, is not sufficient to establish adverse possession beyond the roadbed and track or necessary right of way.—*Brinker v. Union Pac., D. & G. Ry. Co.*, 55 Pac. 207, 11 Colo. App. 166.

[c] (Ill. 1879) Where possession by a railroad is not taken under color of title, it will extend only to the portion actually occupied, and not to any portion of the right of way occupied within 20 years by the original owner.—*James v. Indianapolis & St. L. R. Co.*, 91 Ill. 554.

[d] (Ill. 1900) Where the character and extent of the possession and acts of a railroad company, considered with reference to the nature of railroads, are such as to clearly indicate an adverse claim to a right of way of a certain width, a right of way to that extent may be acquired by prescription, though it is not all occupied by tracks or any other structures.—*Waggoner v. Wabash R. Co.*, 56 N. E. 1050, 185 Ill. 154.

[e] (Ind. 1883) A railroad company authorized by its charter to acquire lands in fee to a certain width for its right of way, which constructs its road across the land of a certain owner, and maintains it for nearly 20 years without instituting condemnation proceedings, or any objection or claim for damages being ever made by such owner, thereby acquires title to a strip of the full width allowed by its charter, and not merely of the width actually used by it.—*Prather v. Western Union Tel. Co.*, 89 Ind. 501.

[f] (Ind. 1903) A railroad which enters on property without color of title, and occupies it as a right of way, acquires merely an easement in the property for purposes of a right of way.—*Consumers' Gas Trust Co. v. American Plate Glass Co.*, 68 N. E. 1020.

[g] (La. 1903) The possession by a railroad of the space occupied by a cut through a hill does not widen with the enlargement of the excavation by the gradual washing in of the sides in the course of time.—*P. & H. H. Youree v. Vicksburg, S. & P. R. Co.*, 34 South. 779, 110 La. 791; *Mahlen & Vatter v. Same, Id.*; *Bernstein Bros. v. Same, Id.*

[h] (Minn. 1887) Where a railroad company occupies land without having the least color of title, constructing its roadway thereon, the adverse possession is only coextensive with the occupancy, and will not include the residue of a 100-foot strip afterwards inclosed, though the railroad was authorized by its charter to take 100 feet for its road.—*Coleman v. Northern Pac. R. Co.*, 36 Minn. 525, 32 N. W. 859.

[i] (Miss. 1884) Occupation by a railroad company for the statutory period of a strip of land on which its roadbed and ditches are situated, its original right being acquired under irregular condemnation proceedings, will ripen into a title only to the extent of the land lying between the outer edges of its ditches.—*Ryan v. Mississippi Val. & S. I. R. Co.*, 62 Miss. 162.

[j] (Mo. 1889) A railroad company entered on lands, and, in the presence of the owner, and on his verbal promise to give a right of way, staked off a right of way of the usual width of 100 feet. The company constructed its tracks, and had actual, exclusive, and continuous possession of the 25 feet along the center of the right of way occupied by the tracks for the prescriptive period, claiming title to the whole strip, and exercising over it such usual acts of ownership as the nature of the property permitted. *Held*, in an action of ejectment by the grantee of the land, who purchased with knowledge of the existence of the road, that the company had title, under the statute of limitations, to the 100-foot strip.—*Hargis v. Kansas City, C. & S. Ry. Co.*, 100 Mo. 210, 13 S. W. 680.

[k] (Neb. 1894) Although color of title is not indispensable to adverse possession, yet where a railroad company enters upon and takes possession of the real estate of another for a right of way, without color of title, such possession is limited to the land actually occupied; and in such case the corporation will acquire a right of way of the width, and no more, which it has so used and

occupied for the full period of limitations.—*Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. 739.

[l] (Neb. 1894) Where a railroad company takes possession of the real estate of another for a right of way, without color of title, its rights acquired by prescription are limited to the land actually occupied, as there is no presumption that it appropriated a strip of the usual width, or all that the statute allows it to take for that purpose.—*Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. 739.

[m] (N. Y. 1901) Plaintiff, through conveyance from P., the original owner, acquired title to land abutting on Fourth avenue, including the fee to the center of the avenue. Subsequent to the execution of this deed, P. conveyed the fee in Fourth avenue, except that conveyed to plaintiff's grantor, to the city in trust for its use as a street. By a later deed P. conveyed the title to a strip 24 feet wide in the middle of the avenue to the defendant, to be used only for the construction of a railroad, and by an agreement entered into with the city the defendant was authorized to construct and operate a railroad on such avenue. The defendant thereafter constructed a surface railroad on the avenue, and maintained the same for about 60 years, when it began to elevate the railroad; and plaintiff brought an action to restrain such construction and recover damages therefor. *Held*, that defendant, as against plaintiff, under the color of title of its deed and its long user of the property, had only acquired a right to operate a surface railroad, as authorized by its agreement with the city and by its grant from P.; and hence it was error for the court not to allow a recovery for the use of the street included in the strip 24 feet wide in the center of the street.—*Sander v. New York & H. R. Co.*, 69 N. Y. Supp. 155, 58 App. Div. 622.

[n] (N. Y. 1903) Where a railroad has operated a track in a village street for more than 30 years with the consent of the village trustees, it raises a presumption of the consent of abutting owners to such construction, but creates no presumption of consent to a switch erected additional to the track.—*Stevens v. Skaneateles R. Co.*, 85 N. Y. Supp. 1005, 42 Misc. Rep. 145.

(128 Fed. 578.)

THE PHILLIP MINCH.

(Circuit Court of Appeals, Sixth Circuit. February 17, 1904.)

No. 1,228.

1. COLLISION—STEAMER AND PASSING TOW.

As a steamer with two barges in tow, each on a line about 500 feet long, was passing up the Detroit river in the daytime, about 800 feet from the Canadian side, and when she was about opposite a dock on that side, the steamer Minch, which had been coaling there, swung out and started slowly across the river, her head diagonally upstream. She continued to move slowly until she struck the rear barge about amidships. When she was some 200 feet ahead of the barge, and 50 to 75 feet on her starboard side, the helm of the barge was starboarded 1 or 1½ points; and immediately before the collision, and when it was inevitable, the helm was put hard aport to lessen the blow. *Held*, that the collision was due to the gross fault of the Minch, and that the barge could not be charged with contributory fault because she did not put her helm hard astarboard, since she had the right to expect the steamer to keep off to a safe distance, and for the further reason that there was a vessel with a tow passing down on the other side, and there was danger that the current might take her into them.

2. SAME—CONTRIBUTORY FAULT—BURDEN AND MEASURE OF PROOF.

It is not enough, when the negligence of one vessel is great, to condemn the other to a division of damages, that the question is a close one as to

whether she might not have done something she did not do to avoid the consequences of the other's negligence; but the evidence that the situation required her to do more than she did must be clear and convincing, since all questions of doubt are to be resolved in her favor.

Appeal from the District Court of the United States for the Northern District of Ohio.

This is a case of marine collision. The accident occurred in the Detroit river, near a coal dock, on the Canadian side, at Sandwich, in the afternoon of a fine day in April, 1896. The steamer Thompson was bound up the river, having in tow two iron whaleback barges, known, respectively, as the "134" and the "104," both coal laden. The 134 was the first in the tow. The tow-lines were of the usual length, of about 500 feet each. When about one-half mile below the coal dock, passing signals of one blast were exchanged with the steamer George T. Hope, bound down, having in tow the schooner Fitzpatrick. When these signals were exchanged, the Hope was about as far above the Sandwich coal dock as the Thompson was below. At this time the steamer Phillip Minch was lying at the Gadfield coal dock, head upstream. The Minch, being bound down, had stopped at the dock to coal. As the Thompson, which was proceeding up, at about 800 feet out from the coal dock with her tow following well in her wake, was passing the dock, the Minch was noticed to be swinging out, her bow pointing somewhat diagonally across the river. The river at this point is about 2,000 feet wide. The movements of the Minch from this moment were closely watched by the passing tow. Both in fact and appearance, she maintained some headway up to the moment of the collision with the 104, which must have occurred within about three minutes from the time the Thompson came abreast of the coal dock. Her heading continued to be nearly across the stream. Her bow had a constant tendency to swing downstream with the current, which was about 2 or 2½ miles per hour. But her headway was enough to hold her against this current, and to slowly make headway out into the stream. So slight was this headway out into the stream, that, when the barge 134 came up abreast of her, the Minch was still abreast of the middle of the coal dock, and about midway of the distance between the 134 and the dock. When the 134 had passed, and the Minch was heading about midway the towline between the two barges, the wheel of the 104 was starboarded a point. But the slow movement of the Minch did not stop, and, when the 104 came abreast, she was not more than 20 feet off her starboard side. A collision was then inevitable, and, for the purpose of lightening the blow, the helm of the 104 was put hard aport, with the intent to swing her stern to port, and thus convert the impact into a glancing blow. The collision which resulted was apparently a light one, and nothing more than a dent in the light iron of her sides was evident. Later it was discovered that her plates below the water line had been sprung so that she took water.

Harvey D. Goulder, for appellants.

Hermion A. Kelley, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The negligence of the Minch may well be regarded as gross and inexcusable. It is said for the Minch that, when she cast her head line off, the Thompson and her tow were nearly a half mile below, and the Hope and her tow an equal distance above, and that her purpose was to move up the river along the Canadian bank, and make her turn behind the Hope and her tow; that, after she had moved up alongside the dock a length, or nearly so, it was discovered that her steering gear would not work; that she was then stopped, and her steering engine found not to be connected with the steam. This

was remedied in a moment, and her movement up the river continued. It was plainly negligent to resume her voyage with her steam steering gear disconnected. This negligence was, however, remote, for her steering gear was properly connected by the time the Thompson came abreast, at which moment she seems to have resumed her movement by swinging her head away from the dock and heading across the stream. Before there was any apparent danger of collision the Minch was fully under control, and her conduct in continuing to run out into the river, with two tows passing, so far as to encroach upon the water which should have been left for them, is most unexplainable. The claim that she did not get her stern more than from 20 to 50 feet from the coal dock, and that the Thompson crowded in upon her without necessity, is not established. There is in this case the usual conflict between the evidence of the witnesses from the several crews as to the position of the Minch at the time of the collision, with reference to the dock. But we have no doubt at all but that the 104 was not less than 600, and probably 800, feet out from the dock at the time of the collision. This being so, the stern of the Minch was not less than 300 feet out from her dock, for her length was only about 275 feet. There was therefore abundant room for the Minch between the dock and passing tow to have waited for the tow to pass, or to back away when she found she was crowding over so far as to arouse even a suspicion of danger. It is said that she did back, and was backing when the collision occurred. But there was no occasion for going so near the path of the tow, and she began her efforts to retrieve her fault too late, for it is certain that she had not lost all of her headway when she struck the 104, for she ran into the barge about amidships, and gave, instead of receiving, the blow. We cannot escape the conclusion that the master of the Minch was either ignorant of the fact that he was encroaching upon the passing tow, or was indifferent to his duties under the circumstances. About her condemnation we have no doubt.

2. But it is said that the 104 did not do all that she could to avoid the collision, and should be condemned as contributing. This is an appeal to rule 28, which makes a vessel responsible for the failure to observe any precaution required by "the special circumstances of the case." To convict the barge of negligence, it is urged that the 104 did not starboard enough when she did starboard, and that, if she had put her helm hard over, instead of a point or point and a half, as she undoubtedly did do, the Minch would have cleared. But did "the special circumstances of the case," as they appeared, require any greater starboarding? When she starboarded, the Minch was about 200 feet above the bow of the barge, and some 50 or 75 feet on her starboard side—a position which, if maintained by the Minch, would have cleared without any starboarding at all. At that moment the Minch was apparently under full control, and she had in no way indicated that she was unmanageable. In fact, she was entirely manageable, and, if she had been then backed strong, would have undoubtedly cleared. About that time engine signals for backing were probably given. But as it turned out, they were ineffective

to stop her headway until too late. These engine signals were evidently given immediately before the collision. As the headway of the Minch continued, the helm of the barge was put hard aport as she came abreast of the barge in an effort to swing her stern away from the Minch and lighten the blow. But this was a movement in extremis. A collision was then inevitable. If the barge is to be condemned at all, it is because she did not put her helm hard astarboard, instead of only about half or two-thirds over. But there were two things to be considered before starboarding so far. There was the descending tow on her port side. The Hope had passed. Her tow, the schooner Fitzpatrick, was nearly abreast on her port side. Her master assisted his wheelsman in starboarding. Referring to the tow on his port side, he says:

"They had not passed us. That is one reason I took the wheel, being a dangerous place—helping the man at the wheel so she would not get the start of him and go over too far, so as to be in danger of the Hope and the Fitzpatrick."

There was also the possibility of a wide sheer to port if the current, against which the barge was contending, should catch her strongly on her starboard bow.

It is true that the master of the barge says that neither of these considerations controlled the question of his actual starboarding, and that he starboarded only a point or a point and a half because he did not think the situation required any greater starboarding in order to give the Minch room for clearing him. But whether he failed to put his helm hard astarboard because of the proximity of the descending tow or not, the fact that that tow was not more than 100 feet off his port side cannot be ignored. If it would have been imprudent to starboard more under the circumstances, then he is not to be condemned for starboarding only so far as he might prudently do, having regard to the dangers incident to such a course. There was no reason why the Minch should not be backed in order to avoid crowding or colliding with the tow. Every consideration of self-preservation, as well as duty to the passing tow, required that she should stop her headway in time to avoid collision. Every movement of the Minch from the time she left the coal dock justified the presumption that she was lying in the river, waiting for the tow to pass. So slight was her headway then that many of the witnesses describe her as having no headway, and as "sagging" or "drifting," and others say she was "lying still." Among the latter are some of the witnesses from her own crew. It is clear, however, that she did have some headway, and was still slowly moving out toward the tow, and had not lost all the headway when she hit the barge.

The master of the 104, Capt. Leonard, impresses us as giving a fair account of the situation immediately preceding the collision in the following questions and answers:

"Q. Could you form any estimate as to about how far the 134 passed from the bow of the Minch? A. Well, I should say between 100 and 150 feet. Q. Up to that time you may state whether the Minch had been moving otherwise than by simply swinging down stream. If so, how? A. Yes, sir; she was forging ahead all the time. Q. Did you notice her wheel—whether it had been in motion at all before that? A. No, sir; not in particular. Q. At this

time you say she had been forging ahead, had she had her stern moved out from the dock? A. Yes, sir. Q. At the time the 134 passed her, how far would you say her stern had moved out from the dock? A. Well, it would be fully as far—150 feet from the dock—as it was from 134. I suppose she was about midway from the dock and 134. Q. And still forging ahead? A. Yes, sir. Q. Diagonally up the river all the time? A. Yes, sir; and swinging a little down all the time. Q. Now, as 134 went by the Minch, and the Minch's bow got abreast of the towline between you and the 134, what did the Minch do? Did she continue to do anything? A. No, sir; not that I noticed, just only lying still, and we forging ahead all the time—I suppose, waiting until we passed by, so as to give her a chance to turn. Q. At the time, after she had got past the stern of the 134, did you anticipate any danger from her? A. No, sir. Q. And why? A. Well, I suppose that at a certain time when he thought it was necessary he would certainly back up his boat to avoid collision. Q. Was there anything, so far as you could see, to prevent his backing up his boat—anything in the river? A. No, sir. Q. And after the 134 had passed the bow of the Minch, and the bow of the Minch was along down abreast of the towline, what, if anything, did you do then? A. I thought he was waiting for us to pass, and I started at my wheel in order to give him all the room that I could. Q. Were you at the wheel at the time of that maneuver? A. Yes, sir. Q. You helped turn the wheel yourself? A. Yes, sir. Q. Did your boat's bow sway to port in obedience to that? A. Yes, sir. Q. How far to port? A. We had the 134 all the way from a point to a point and a half on our starboard bow. Q. At this time do you remember whereabouts the Hope and Fitzpatrick were? A. They hadn't passed by us. That is one reason I took the wheel, being a dangerous place, helping the man at the wheel so she wouldn't get the start of him and go over too far, so as to be in danger of the Hope and Fitzpatrick. Q. Supposing we say that you had put your wheel hard astarboard, did you anticipate that there might have been danger of your going over and getting mixed up? A. Well, I don't think that I could put my wheel hard astarboard, for I would have went into it. I had to give the Minch all the room I thought it was perfectly safe to do. Q. At the time you put your helm hard astarboard, did you then anticipate any danger of collision with the Minch? A. No, sir. Q. And why? A. I supposed when he saw it he would back his boat up, to avoid collision. Q. Where was the Minch when you first anticipated that he wasn't going to back up? A. She was right close onto us—within fifteen or twenty feet of us. Q. When you first realized or anticipated that there was danger of collision, what did you do? A. When I saw there was no way of avoiding collision—when he was pretty near amidships—I put my wheel hard aport, so as to swing her stern to port, to make the blow as light as I could. Q. At the time you put your helm hard aport, how was your boat heading, with reference to the 134 ahead of it? A. When I put my wheel to port she was heading still to port of 134. Q. About how much? A. A point to a point and a half. When I got her off as far as I could, I held her until I saw there was no possible way except for the Minch to come into us, and then I shifted my wheel. She was lying perfectly still until I shifted my wheel. Q. What would be the effect, then, upon your vessel's stern, of throwing your wheel hard aport when she was in that position? A. It would throw her stern to port. Q. Away from the Minch? A. Yes, sir. Q. Where did the Minch's bow strike your boat? A. About amidships. Q. You were at that time, I understand you, on the wheelhouse, after it occurred? A. Yes, sir; I was at the wheel. Q. State, to the best of your judgment, what the distance of the stern of the Minch was from the Gadfield coal dock at the time her bow struck the 104? A. I would say 500 feet. Q. You may state whether up to that time there was anything in the river, or anything apparent on board the Minch, or anywhere in that vicinity, which would indicate to you that there was any reason why the Minch could not back? A. No, sir. Q. I will ask you whether the Minch gave any danger signals, or any signals to indicate that she was disabled or could not back? A. No, sir. Q. And was there anything between her stern and the dock that you know of? A. No, sir."

The situation was one which was brought about by the gross negligence of the Minch. In such circumstances, it is not enough for

her to cast doubt upon the management of the barge. The burden is upon her to establish by clear and convincing evidence that the situation as the barge should have judged it was one which required her to at once put her helm hard over, instead of half over, as she did. *The Ohio*, 91 Fed. 547, 33 C. C. A. 667, 672; *The City of New York*, 147 U. S. 73, 84, 13 Sup. Ct. 211, 37 L. Ed. 84; *The Oregon*, 158 U. S. 187, 197, 15 Sup. Ct. 804, 39 L. Ed. 943; *The Victory*, 168 U. S. 410, 423, 18 Sup. Ct. 149, 155, 42 L. Ed. 519; *The Umbria*, 166 U. S. 404, 409, 17 Sup. Ct. 610, 612, 41 L. Ed. 1053. In the case of *The Victory*, cited above, the court said:

"As between these vessels, the fault of the *Victory* being obvious and inexcusable, the evidence to establish fault on the part of the *Plymouthean* must be clear and convincing in order to make a case of apportionment."

In *The Umbria*, cited above, Justice Brown said:

"Indeed, so gross was the fault of the *Umbria* in this connection that he should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85 [13 Sup. Ct. 211, 37 L. Ed. 84], and *The Ludwig Holbert*, 157 U. S. 60, 71 [15 Sup. Ct. 477, 39 L. Ed. 620], that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

The circumstances were not such as to justify an apportionment of damages simply because the master of the barge judged that the *Minch* would take timely measures to avert a collision. The negligence of the master of the *Minch* in not observing his own unreasonable encroachment upon her course, or in not taking timely measures to stop his headway out into the river, is a sufficient explanation of the collision which ensued. *The Servia*, 149 U. S. 144, 153, 13 Sup. Ct. 817, 37 L. Ed. 681; *The Ulster*, 1 Mar. L. C. 234.

Whether the barge might not, with safety, have starboarded more than she did, and whether, if she had put her helm hard to starboard, the collision would have been avoided, may be close questions. Indeed, we may concede that the question is a debatable one, whether, under all the circumstances, she may not be regarded as in fault for not putting her helm hard astarboard, instead of halfway over. But it is not enough in any given case to say that the sequel shows that, if a particular thing had been done by the innocent vessel, the collision would have been avoided. "The question in all such cases is whether, in the exercise of due care and caution in the management of her at the time in any given case, such direction should have been given." *Williamson v. Barrett*, 13 How. 100, 108, 14 L. Ed. 68. Neither is it enough, when the negligence of the one vessel is great, to condemn the other to a division of damages, that the question is a close one as to whether she might not have done something she did not do to avoid the consequences of the other's negligence. The evidence that the situation was one which required her to do more than she did must be clear and convincing, for all questions of doubt should be settled in her favor. We do not think the evidence establishes a case which was so plain as to make it culpable negligence for the barge to presume that the *Minch* would not be guilty of the astonishing fault of deliberately running into the ascending tow, and that she should be condemned for presuming, under the

facts we have stated, that the Minch would stop her heading toward the 104 by either backing, or by a radical change in her steering, in time to avoid collision. If the circumstances had indicated that the Minch was disabled or had not seen the tow, a different case would be presented.

The decree of the district court condemning the Minch and denying a division of damages is affirmed.

(128 Fed. 584.)

BUCKINGHAM v. ESTES.

(Circuit Court of Appeals, Sixth Circuit. March 16, 1904.)

No. 1,245.

1. APPEAL—OBJECTIONS TO PARTIES—TIME.

Where suit was brought by a married woman against her husband and his trustee in bankruptcy to enforce a resulting trust of certain land standing in his name, an objection that a judgment in her favor was erroneous because she, being a married woman, had no power to sue without the intervention of a trustee or next friend, and that no decree *pro confesso* was taken against her husband on his failure to answer, could not be made for the first time on appeal.

2. SAME—BANKRUPTCY—RESULTING TRUSTS—PARTIES.

A bankrupt is not an indispensable party to a suit by his wife against his trustee in bankruptcy to enforce a resulting trust of real estate scheduled as a part of the bankrupt's assets.

3. SAME—RECORD.

Where, on appeal from an order allowing a claim against a bankrupt's estate, the transcript failed to disclose the date of the adjudication, an objection that the allowance was erroneous because the claim was not proved within one year after the adjudication, as required by Bankr. Act, § 57n (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), was unavailable.

4. SAME—PROOF OF CLAIM—ACTIONS.

Where a bankrupt's wife brought suit against the bankrupt and his trustee to enforce an alleged resulting trust concerning lands transferred as a part of the bankrupt's assets within a year after the adjudication of bankruptcy, in which she subsequently recovered a decree, the claim was sufficiently "proven," within Bankr. Act, §§ 57, 57n (Act July 1, 1898, c. 541, 30 Stat. 560, 561 [U. S. Comp. St. 1901, pp. 3443, 3444]), requiring claims to be proved within a year, and authorizing amendment of the claim after a year has elapsed.

5. SAME—DECREE—ACCOUNTING—REVIEW.

Where, in an action by a bankrupt's wife to enforce a resulting trust of land assigned as a part of the bankrupt's assets, the court rendered a decree in plaintiff's favor and adjudged her entitled to rents, and thereafter referred the matter to the master, only to determine the amount of such rents, an appeal from a decree confirming the master's report settling the amount of the rents did not authorize a review of the wife's right to recover any rents under the facts.

6. ASSIGNMENT OF ERROR.

Where, on appeal from an order confirming a master's report as to the amount of rents a bankrupt's wife was entitled to under a decree en-

¶ 1. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 448.

forcing a resulting trust of land held by the bankrupt, none of the errors assigned raised any question as to the correctness of the decree in favor of the wife for rents and profits, but all of them related to the question of amount, the wife's right to recover rents could not be reviewed.

7. SAME—SUFFICIENCY OF EVIDENCE—FINDINGS OF MASTER—AFFIRMANCE.

Where the trial court affirmed findings of a master on an accounting of rents, such finding will not be reversed on appeal, unless a plain mistake is definitely pointed out.

Appeal from the District Court of the United States for the Western District of Tennessee.

In Bankruptcy.

The appellee, the wife of Z. N. Estes, a bankrupt, filed her petition in the bankruptcy proceeding for the purpose of enforcing a resulting trust in a certain parcel of land which the trustee in bankruptcy was about to sell as the property of the bankrupt, and also for the purpose of recovering against the bankrupt's estate the rent received from said land by the bankrupt as trustee for the sole and separate use of his wife, the petitioner. The bankrupt trustee and the bankrupt were made parties, and duly served with process. Such proceedings were had as resulted in a decree in favor of Mrs. Estes, finding that the bankrupt, as trustee of a fund to the sole and separate use of his wife under the will of her father, had invested this fund in the land in question, and taken the title to himself without the knowledge or consent of his cestui que trust. The decree directed the trustee to convey the land to the petitioner to her sole and separate use. The court also decreed that the bankrupt was liable to account to petitioner for the rents collected by him as trustee since his qualification as her trustee, and allowed her claim for rents and profits, without interest, and ordered that she "be admitted to prove the same as a debt against the individual estate of the bankrupt." For the purpose of ascertaining the amount of her claim so allowed to be proven, the standing master of the court was ordered to take and state an account "of all rents, profits, or income which the said Z. N. Estes has received from said estate since March 27, 1871, up to this date," and that he will report same, without interest, to this court. It was further ordered that, "upon the coming in of this report showing the sums due petitioner upon said account, she will stand as a creditor against the individual assets scheduled as his, to the extent of such amount, in the settlement of this estate in bankruptcy." The petition of Mrs. Estes was filed February 19, 1902. This decree was made on October 25, 1902. The trustee filed a report December 15, 1902, fixing petitioner's claim at \$5,338.90. January 15, 1903, Mrs. Estes filed a formal proof of debt, based upon this report. March 28, 1903, exceptions to this report, filed by the trustee, were overruled, and the report confirmed. By this decree the referee was directed "to place said claim upon the list of allowed claims and dividends as provided by Form No. 40 of the forms in bankruptcy, to be recorded by him and delivered to the trustee, to the end that same may be paid by the trustee as other allowed claims against the individual estate of Z. N. Estes herein." On April 4, 1903, the trustee filed his petition, reciting that he was "much aggrieved by a decree entered herein on the 28th of March, 1903, allowing Mrs. Janet Collier Estes to prove her claim as a creditor against the individual estate of Z. N. Estes in this proceeding to the extent of \$5,338.90," and praying an appeal therefrom.

Carroll, McKellar, Bullington & Biggs, for appellant.

J. P. Holt, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The trustee has entered a motion here to dismiss the petition of Mrs. Estes, the appellee, because she is a married woman, and can-

not sue in her own name without the intervention of a trustee or next friend. Without regard to the merits of this motion, such an objection cannot for the first time be taken upon appeal. *Rankin v. Warner*, 2 Lea, 302. No objection was taken below, and no error has been assigned. The motion is therefore denied.

He has also moved to dismiss her suit because her husband, the bankrupt, who was made party, did not answer, and no decree pro confesso was taken. This is equally untenable. No such objection was made below, and no error has been assigned because the court proceeded to a decree without a pro confesso against the bankrupt. As the bankrupt had scheduled the property sought to be recovered as his own, the legal title vested in his trustee, who did answer and defend. The bankrupt was therefore not an indispensable party to the petitioner's suit. A formal objection of this kind cannot for the first time be made in this court. *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 469.

The first error assigned is that the court erred in allowing Mrs. Estes' claim for rents and profits against the bankrupt, because the claim was not proved within one year after adjudication of bankruptcy, as required by section 57n, Bankr. Law (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]). One insurmountable objection to this assignment is that the date of adjudication nowhere appears in the transcript of the record. The counsel for appellee called attention to this defect in a printed brief bearing the file mark of November 24, 1903. This cause was not heard until February 8, 1904, yet no step was taken to supplement the transcript so as to show the date of adjudication. The presumptions are in favor of the correctness of the action of the court below, and if we are to reverse it must be upon a transcript which will affirmatively show the ground upon which the action complained of was taken. But if we assume that the formal proof of Mrs. Estes' claim for rents and profits, filed January 15, 1903, was not made until more than one year after date of adjudication, it does not appear, and it is not claimed, that her petition setting up her claim in the bankrupt proceeding was not filed within one year after the adjudication. It would be a narrow construction of sections 57 (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) and 57n which would not regard a claim so presented and litigated in the bankrupt proceeding as "proven" within the limitation of the section. A claim "proven" within the year is amendable after the lapse of the year, and the court below probably regarded her petition as a "statement under oath, in writing, signed by a creditor, setting forth the claim," etc., and therefore subject to amendment, to comply with the further formalities of section 57. In this the court did not err. *Hutchison v. Otis*, 190 U. S. 552, 555, 23 Sup. Ct. 778, 47 L. Ed. 1179.

The solicitors for the appellant, in their brief, present an argument against any allowance of the claim for rent, based upon the contention that Mrs. Estes permitted her husband to collect and hold and use these rents for his own purposes, without at any time objecting or calling him to account. The liability of the bankrupt to the petitioner for the rents collected as trustee was adjudged by the decree of Oc-

tober 15, 1902, and the only matter referred to the master was the amount of such rents. The decree of March 28, 1903, confirmed the report settling the amount. The appeal is from the last decree. This was the final decree, and a general appeal would undoubtedly open up all prior decrees of an interlocutory character. There is, in view of the terms in which this appeal was prayed and allowed, room for regarding the appeal as limited to the question of the amount of the rents collected by the bankrupt as trustee for his wife. But, waiving this, the effect of the rule requiring an assignment of error to be filed in the court below before the appeal is allowed operates in itself as a limitation of the appeal. No error was assigned which raises any question of the rightness of the decree below, holding that the petitioner was entitled to recover the tract of land she sued for, or the liability of the bankrupt to account to her as trustee for the rents he had collected on her land. Every error assigned, except the first, that the claim had not been proven within one year after adjudication, goes exclusively to the amount of rents collected. This is a fatal objection to the consideration of any other question.

The errors assigned from 2 to 9, inclusive, complain that the master and the court erred in respect to the amounts of rent shown to have been collected. This raises a question of the weight or sufficiency of evidence. The master and the court below concurred in the finding of facts, and when that is the case this court will not reverse or modify, unless a very plain mistake is definitely pointed out. *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Kiewert v. Juneau*, 78 Fed. 712, 24 C. C. A. 294; *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891.

The question was one peculiarly proper for an accounting, and we see no sufficient reason for disturbing the results reached below. Certainly no plain mistake of either law or fact has been pointed out. The result must therefore be the affirmation of the decree, which is accordingly ordered.

(128 Fed. 587.)

A. G. CORRE HOTEL CO. v. WELLS-FARGO CO.

(Circuit Court of Appeals, Sixth Circuit. March 25, 1904.)

No. 1,253.

1. LEASES—RENEWAL—COVENANTS—ESTOPPEL.

Complainant rented a storeroom, which constituted a part of a hotel, under a lease containing an option for renewal. Thereafter the entire hotel was leased to defendant, under a lease which expressly provided that it was subject to the existing lease on the store; the tenant attorning and paying rent to become due for the same to defendant, its successors and assigns. Complainant's lease was filed for record 4½ months after defendant's lease of the hotel was recorded, and defendant, without making any inquiry as to the covenants in complainant's lease, or examining the record, continued to accept rent from complainant for more than a year after complainant's lease was recorded. *Held*, that the clause in defendant's lease of the hotel, referring to complainant's lease, was a limitation of defendant's grant, and the estoppel created by such clause,

and confirmed by defendant's conduct in accepting rent from complainant after record of its lease, precluded defendant from denying complainant's right to exercise its option to renew.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

E. W. Strong and James J. Muir, for appellant.
C. B. Matthews, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The case grows out of the following facts: On December 2, 1896, the owners of the Gibson House Block, in Cincinnati, made a written lease of the storeroom and basement at No. 415 Walnut street, in said block, to the Wells-Fargo Company, the appellee, from January 1, 1897, to April 1, 1902, at a rental (payable monthly) of \$1,900 per annum, until April 1, 1898, and thereafter at \$2,000 per annum, until the completion of the term. The lease contained the following covenant:

"And it is further covenanted and agreed between the parties aforesaid that the party of the second part shall have the privilege of renewing this lease for an additional term of five years at \$2,000 per annum."

This lease was duly acknowledged by the parties in December, 1896, but not recorded until January 29, 1901. The appellee took possession of the leased premises on January 1, 1897, and has been in possession continuously ever since, paying the rent at first to the owners of the premises, and afterwards to the appellant, the A. G. Corre Hotel Company. In 1900 the appellant entered into negotiations with the owners of the Gibson House Block, through their attorney, Mr. Paxton, for a lease of the block. At this time, in addition to the lease held by the appellee, there was outstanding a lease for another storeroom in the Gibson House Block, on Walnut street, to the Atchison, Topeka & Santa Fé Railroad Company. Mr. Paxton testified that he wanted at first to except from the lease to the hotel company these two existing leases, retaining them for the estate; but the hotel company insisted on having the entire block, so the rental to be paid by it was increased by the amount of rental provided in these two leases. When he came to dictate the final proposition, the question of the existing leases came up. He made a search for them, but failed to find them. He knew that tenants were in possession, paying rent, and assumed they were there under some sort of leases, but did not know the terms. So, as he explained, in order to protect the Gibson heirs and avoid the necessity of a postponement to ascertain the precise terms of these leases, the following clause was inserted into the proposition (which was accepted) and the lease:

"This lease is subject, however, to the existing leases upon two stores front-on Walnut street; the tenants therein attorning and paying the rents to become due for said two stores to the lessee, its successors and assigns."

The lease to the appellant (containing the above clause) was dated July 2, 1900, and provided for a lease for the term of 10 years and 6 months, beginning July 1, 1900, and ending January 1, 1911, at a rental of \$32,000 per annum, payable in monthly installments, with the

privilege to the lessee of an additional term of 10 years, at a rental of \$39,000 per annum. This lease was duly acknowledged, and was recorded on September 11, 1900, 4½ months before the appellee's lease was left for record. The appellant entered into possession of the Gibson House Block on July 1, 1900, and thereafter collected from the appellee the monthly rental on its lease for the storeroom on Walnut street; the latter attorning to the former and paying its rent in accordance with the clause in the former's lease. On January 29, 1901, the appellee's lease was left for record, and thereafter, until April 1, 1902, the appellant continued to recognize the appellee as lessee, collecting the rent regularly as before.

On or about March 1, 1902, the appellee notified the appellant and the owners of the Gibson House Block of its election to renew its lease for the further term of 5 years in accordance with the clause quoted, whereupon the appellant repudiated the appellee's lease, claiming it had no knowledge of its contents, and that, not being recorded at the time its own lease was acknowledged and placed on record, the appellee's lease was fraudulent as to it. Possession of the premises being demanded and refused, the appellant brought an action in ejectment against the appellee, and the latter, having no defense except an equitable claim to a renewal of the lease, recovered a judgment. Thereupon this suit was brought by the appellee to compel the execution of a lease for the further term of 5 years, and to enjoin the appellant from enforcing the judgment in the ejectment suit. The court below rendered a decree as prayed for, from which an appeal has been taken.

The appellant relies upon section 4134 of the Revised Statutes of Ohio of 1892, which provides:

"All other deeds and instruments of writing for the conveyance or incumbrance of any lands * * * shall be recorded, * * * and until so recorded or filed for record, the same shall be deemed fraudulent, so far as it relates to a subsequent bona fide purchaser having at the time of purchase no knowledge of the existence of such former deed or instrument."

Counsel have discussed the question whether, in view of the open, continuous, and notorious possession by the appellee of the storeroom, and of the clause in appellant's lease reciting the existence of the appellee's lease, the appellant was, within the meaning of the statute, a subsequent bona fide purchaser, having at the time of purchase no knowledge of the existence of the appellee's lease. We prefer, however, to place our decision, not upon the knowledge of the appellee's lease, brought home to the appellant through open possession and the recital referred to, but upon the fact that the conveyance or lease to the appellant was by express terms made subject to the existing lease to the appellee. The clause operated as a limitation of the grant. There was no conveyance of the storeroom occupied by the appellee, except subject to its lease. So long as its lease should exist, the appellee was to attorn and pay rent to the appellant, and the extent of the conveyance was the substitution of the appellant for the Gibson heirs as landlord.

Paraphrasing the language of the Supreme Court of Ohio in *Coe v. R. R. Co.*, 10 Ohio St. 372, 406, 75 Am. Dec. 518, it was not in-

tended by the statute relied on to give to any lease, upon the ground of its prior record, an effect forbidden by the very terms of the lease itself. The appellant's lease is expressly made subject to the lease of the appellee, and according to the clear intent of the parties, expressed upon its face, can only operate subject to the terms of the lease to the appellee. The existence of the lease to the appellee, and, therefore, the rights under it, having been expressly recognized in the lease to the appellant, the appellant is estopped from questioning its validity. *Wagner v. R. R. Co.*, 22 Ohio St. 563, 581, 10 Am. Rep. 770. See, also, *Bercaw v. Cockerill*, 20 Ohio St. 166; *Bundy v. Iron Co.*, 38 Ohio St. 300; *Westervelt v. Wyckoff*, 32 N. J. Eq. 188; *George v. Kent*, 7 Allen, 16; *Tuite v. Stevens*, 98 Mass. 305; *Howard v. Chase*, 104 Mass. 249; *Johnson v. Thompson*, 129 Mass. 398.

The estoppel thus created by the clause of the lease was confirmed by the conduct of the lessee, the appellant. Having accepted a lease made in terms subject to that of the appellee, it never inquired of the appellee as to the contents or terms of its lease, but entered into possession and at once began to collect rent under it. The collection of this rent was not the making of a new lease, but an affirmative recognition of the existing one. The presumption was that the appellant had informed itself of the contents and terms of the lease when it proceeded to collect the rent. It could not expect to collect the rent without complying with the contract in all its terms. From July 1, 1900, until April 1, 1902, the appellant continued to collect rent from the appellee; 14 months of this time being after the appellee's lease had been placed on record, and when the appellant was fully advised of the provision giving the appellee the option to renew the lease for five years more.

We think the appellant was bound to inform itself of the terms of the appellee's lease, for it had accepted a lease expressly made subject to the appellee's, and, therefore, subject to its terms, whatever they might be; but, if there be doubt about this, the appellant was informed, when the appellee put its lease on record in January, 1901, of its precise terms, including the renewal clause, and could not go on collecting rent after that time for 14 months, without recognizing the validity of the lease in all its terms, and without estopping itself from refusing, as landlord, to comply with the renewal clause.

The judgment is affirmed.

128 Fed. 529.)

GILBERT v. BURLINGTON, C. R. & N. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1904.)

No. 1,986.

1. CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE—QUESTION FOR THE COURT.

While the questions of contributory negligence and proximate cause are, like other questions of fact, ordinarily for the jury, they are for the court where there is no substantial conflict in the evidence, and the conclusions from it are such that all reasonable men must agree upon them.

2. SAME—TEST.

The test of contributory negligence is whether or not the want of care directly contributes to the injury, not whether or not it is a more proximate cause of it than the negligence of the defendant. If it directly contributes to the injury, it is fatal to the plaintiff's recovery, although the negligence of the defendant may be the more proximate cause of it.

3. INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—CHOOSING THE MORE DANGEROUS OF TWO METHODS.

Where there is a comparatively safe and a more dangerous way of discharging a duty known to a servant, it is negligence for him to select the more dangerous method, and, if his selection directly contributes to his injury, it is fatal to his recovery therefor.

4. SAME—VOLUNTARY FAILURE TO USE UNCOUPLING DEVICE—EVIDENCE OF.

The act of March 2, 1893, c. 196, 27 Stat. 531 (3 U. S. Comp. St. 1901, p. 3174), which makes it the duty of common carriers to equip their cars engaged in interstate traffic with couplers which can be uncoupled "without the necessity of men going between the ends of the cars," imposes upon the employes the correlative duty of using these couplers when furnished, and of refraining from unnecessarily going between the ends of cars to uncouple them. A failure of a servant to discharge this duty, which directly contributes to his injury, is fatal to an action for damages on account of it.

5. SAME.

One who voluntarily and unnecessarily exposes himself to an imminent known danger, and thereby directly contributes to his injury, cannot escape the fatal effect of his contributory negligence because the unknown negligence of the defendant, which concurred to produce the injury, made the danger greater than he supposed it to be.

6. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

A railroad company accustomed to keep its guard rails blocked permitted the block to disappear from one of them. A brakeman, in ignorance that the block had disappeared, after trying to couple two moving cars by means of a lever on his side of the train, failed to use or to try to use the lever on the other side of the train, which had been furnished for the same purpose, entered between the ends of the cars, uncoupled them without the use of the lever, caught his foot between the guard rail and the main rail, and was injured. *Held*, conceding, but not deciding, that the company was negligent in permitting the guard rail to become unblocked, the plaintiff failed to exercise ordinary care; his failure directly contributed to his injury, and was fatal to his action for damages on account of it.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

For opinion below, see 123 Fed. 832.

This is an action brought by Charles Gilbert, the plaintiff in error, against the Burlington, Cedar Rapids & Northern Railway Company and the Chi-

cago, Rock Island & Pacific Railway Company to recover damages for a personal injury which he sustained, as he alleged, by reason of the negligence of the Burlington Company. The complaint stated a cause of action against that company, and contained an averment to the effect that the Rock Island Company had assumed the debts and liabilities of the former corporation. The answer denied the material allegations of the complaint, and alleged that the plaintiff's injury was caused by his own negligence. There was a trial to a jury, and at the close of the plaintiff's evidence the court instructed the jury to return a verdict for the defendants. This ruling and the judgment upon it are assailed by the writ of error. The facts established at the close of the testimony were these: The Burlington Company owned and operated a railroad upon which it had blocked the guard rails and frogs, but a few days before the plaintiff was injured one of these blocks had disappeared from a guard rail in the yard at Iowa Falls, in the state of Iowa, where the plaintiff was at work for the company as head brakeman of a crew of men who were engaged in switching the cars and making up trains. Gilbert's two assistants in this crew had noticed that the blocking to the guard rail was gone, but Gilbert testified that he was not aware of that fact. A few moments after 6 o'clock in the afternoon of May 7, 1902, the plaintiff was engaged with his crew in uncoupling and kicking off upon another track the most southerly of a string of cars, which they were handling by means of an engine attached to the north end of it. The south car of this train was a Street stable car, and the next car north of it was a Northwestern car. Each of these cars was equipped with automatic couplers, the character and operation of which are described in this way in the testimony: "The cars are coupled together by what are known as 'automatic couplers,' which consist of drawbars with knuckles, so called, upon the ends of them, which open and shut, and when shut and clasped together are held in place by means of a pin, and which may be uncoupled by the raising of the pin which cannot be pulled clear out, however, but raised a certain distance and held, and which, when the coupling apparatus is in order, may be raised and held by the manipulation of a lever upon the outside of the car, which is attached to a pin by means of a rod and chain. When the pin is raised and held in place, then by the movement of either car from the other the cars become uncoupled." The lever to pull the pin on the north end of the Street stable car was on the east side of the car. The lever to pull the pin on the south end of the Northwestern car was on the west side of the car. There was no defect in the couplers nor in the apparatus for pulling the pins. It was impossible to pull the pins when the string of cars was drawn tight so that there was no slack between them, or, as the witnesses expressed it, "when the slack was tight." Gilbert was on the east side of the train, giving signals and orders to his men. He signaled the engineer to kick off the Street stable car, and undertook to uncouple it. The train stopped. He seized the handle of the lever on his side of the train, and endeavored to pull the pin with it, but the slack was tight, and he could not do so. The train started south. He walked by the side of it, and endeavored several times to pull the pin by means of the lever and failed. He then stepped in and walked along between the cars, which were moving at the rate of about two or three miles an hour, and tried in vain to raise the pin on the Street stable car with his hands. Thereupon he turned away, but still remained facing the Street stable car more than the Northwestern car, seized the chain, and tried to raise the pin in the latter car, but could not do so. He then turned back to the Street stable car, shook the chain on its pin, pulled the pin up, the cars uncoupled, he caught his foot in the unblocked guard rail, and lost his leg. It was the custom of the brakemen, when they were unable to pull the pin with the lever on their side of the train, to step in between the cars and raise the pin with their hands without attempting to use the lever upon the other side of the train. The pins were at about the height of Gilbert's breast as he walked along between the cars. He testified that he did not try to operate the lever on the opposite side of the train; that one could get a leverage by its use, but that he did not know whether a man could use his strength to more advantage on the lever than he could directly on the pin or on the chain attached to it. He also testified at the trial that he did not find out what the trouble was with the levers and

pins, but a written account of the accident, which he signed about a month after his injury, contains this statement: "The second time I attempted to pull up this lever it worked all right, and I cut the car off. The slack mustn't have been out of the cars the first time I tried it. Sometimes they work hard when this is the case. Far as I know, the couplers were in good condition. They only worked hard, is all."

Humphrey Barton (John E. Samuelson, on the brief), for plaintiff in error.

McNeil V. Seymour (Edward C. Stringer and Carroll Wright, on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case presents these two questions: Was there any substantial evidence that the Burlington Company was guilty of a failure to exercise ordinary care to keep its railroad in a reasonably safe condition? Was the evidence that the plaintiff was guilty of negligence which directly contributed to his injury so conclusive that all reasonable men in the exercise of an impartial judgment must draw that conclusion?

The only fact disclosed by the evidence which is claimed by counsel for the plaintiff in error to indicate negligence on the part of the railroad company is that it adopted the practice of keeping its frogs and guard rails blocked, and then permitted one of them to become unblocked without notice to the plaintiff. But it is a mooted question among the owners and operators of railroads whether the blocked or the unblocked frog and guard rail present the nearer approach to safety. Many are of the opinion that the blocked rail is less dangerous than the unblocked rail, and adopt the practice of blocking their guard rails. Many are of the opposite opinion, and leave their rails unblocked. Railway companies have and must exercise much judgment and discretion in determining the methods of construction and operation of railroads which they adopt, and there is a wide field here, where their decision of doubtful questions in the affirmative or in the negative cannot be held to disclose any want of ordinary care. In the matter under consideration they are charged with negligence if they block their guard rails, because employes are liable to stub their toes and fall over the blocks (*Morris v. Duluth, S. S. & A. Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661), and they are charged with negligence if they fail to block them because servants are liable to put their feet between the rails and get them caught there to their injury (*Kilpatrick v. Choctaw, O. & G. R. Co.*, 121 Fed. 11, 57 C. C. A. 255). In this state of the case the Supreme Court (*Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391) and this court (*Kilpatrick v. Choctaw, O. & G. R. Co.*, 121 Fed. 11, 13, 57 C. C. A. 255, 257) have reached the conclusion that "railroad companies are at liberty to determine for themselves, in the light of their experience, which form of frog is preferable, so long as both forms are in common use, and that it is not competent for a jury to hold a railroad company guilty of negligence because it adopts

one form of frog in preference to another." The contention of counsel for the plaintiff here is, however, that the Burlington Company was guilty of negligence because it blocked its frogs and guard rails and then permitted the block to disappear from the rail, which inflicted the injury, without notice of its disappearance to the plaintiff. But actionable negligence is a breach of the duty to exercise ordinary care. Where there is no duty there can be no breach, no negligence, and no recovery. The Burlington Company owed the plaintiff no duty to block its frogs or guard rails, or to keep them blocked, because its duty of exercising ordinary care was completely discharged by leaving them all without blocks. If it blocked them, and kept them blocked, and this action made the railroad less dangerous, this action was nevertheless not the exercise of ordinary, but of extraordinary, care, and the failure to continue to exercise it does not seem to have been negligence, because negligence is confined to the failure to exercise ordinary care. As it was not a failure in the exercise of ordinary care, and was not actionable negligence for the company to leave all its guard rails and frogs unblocked, it is difficult to see how its failure to keep them all blocked, or its allowance of one or more of them to become or to remain unblocked, can constitute a failure to exercise that degree of care. Such a theory seems to be a contradiction of the axiom that the whole is greater than any of its parts and includes them all. The court below, however, was of the opinion that the plaintiff was guilty of contributory negligence which was fatal to his recovery even if the defendant was negligent in the care of its guard rail, and we turn to the consideration of that question.

There is no substantial conflict in the evidence, and the question here is whether or not it so conclusively discloses the fact that the plaintiff was guilty of negligence which contributed to his injury that all reasonable men in the exercise of their impartial judgment must draw that conclusion. The question of the existence of contributory negligence, like every other question of fact, is ordinarily conditioned by conflicting testimony and by doubtful deductions from the evidence, and hence is generally a question for the jury. But if, at the close of the trial, the evidence so clearly discloses the fact that the plaintiff was guilty of negligence which directly contributed to his injury that a finding to the contrary could not be sustained, it is the duty of the trial court to instruct the jury to return a verdict for the defendant. *Clark v. Zarniko*, 106 Fed. 607, 608, 45 C. C. A. 494, 496; *Railway Co. v. Davis*, 53 Fed. 61, 3 C. C. A. 429; *Gowen v. Harley*, 56 Fed. 973, 980, 6 C. C. A. 190, 197; *Railway Co. v. Moseley*, 57 Fed. 921, 922, 923, 6 C. C. A. 641, 643; *Reynolds v. Railroad Co.*, 69 Fed. 808, 810, 16 C. C. A. 435, 437, 438, 29 L. R. A. 695; *Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co.*, 60 Fed. 351, 354, 9 C. C. A. 1, 4; *Motey v. Granite Co.*, 74 Fed. 155, 157, 20 C. C. A. 366, 368; *Commissioners v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

Much is found in the brief and much was said upon the argument concerning the question whether or not the negligence of the plaintiff was the proximate cause of his injury, and concerning the duty of the court below to submit that issue to the jury. But the court's duty in that regard was governed by the same rule. *Railway Co. v. Davis*, 3 C. C. A. 429, 431, 53 Fed. 61, 63; *Missouri Pac. R. Co. v. Moseley*, 57 Fed. 921, 926, 6 C. C. A. 641, 647; *Motey v. Granite Co.*, 20 C. C. A. 366, 369, 74 Fed. 155, 157.

Again, the question in cases of alleged contributory negligence is not whether the negligence of the plaintiff or that of the defendant is the more proximate cause of the injury, but it is whether or not the negligence of the plaintiff directly contributed to it. One whose negligence directly contributed to his injury cannot recover damages of another whose negligence concurred to cause it, although the carelessness of the latter was the more proximate cause of it. *Pyle v. Clark*, 25 C. C. A. 190, 192, 79 Fed. 744, 746, 747; *Motey v. Granite Co.*, 20 C. C. A. 366, 369, 74 Fed. 156, 159; *Chicago & N. W. Ry. Co. v. Davis*, 3 C. C. A. 429, 431, 53 Fed. 61, 63; *Railway Co. v. Moseley*, 6 C. C. A. 641, 643, 646, 57 Fed. 921-923, 925; *Reynolds v. Railway Co.*, 16 C. C. A. 435, 69 Fed. 808, 811; *Schofield v. Railway Co.*, 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railroad Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *Hayden v. Railway Co.*, 124 Mo. 566, 573, 28 S. W. 74; *Wilcox v. Railway Co.*, 39 N. Y. 358, 100 Am. Dec. 440.

Let us apply these rules to the facts of this case. It is so dangerous for the employés of railroad companies to go between the ends of cars to couple or to uncouple them that Congress passed an act on March 2, 1893, which made it the duty of common carriers to equip all their cars engaged in moving interstate traffic with couplers which can be uncoupled "without the necessity of men going between the ends of the cars" (27 Stat. 531, c. 196, 3 U. S. Comp. St. p. 3174), and the Legislatures of many of the states have enacted laws of a similar nature to regulate carriers within their respective borders. In this way the duty was imposed upon common carriers by the law to so equip their cars that they could be uncoupled without requiring their servants to go between the ends of the cars. The devolution of this duty upon the carriers necessarily imposed upon their servants the correlative duty of using the equipment thus furnished to them, and of refraining from going between the ends of the cars to couple or uncouple them unless compelled to do so by necessity. Under this legislation the breach of either of these duties became a failure to exercise ordinary care, and constituted actionable negligence. The two cars which the plaintiff sought to uncouple were supplied with mechanical devices for separating them without requiring the employés of the railroad company to go between the ends of the cars. These devices were not defective in construction or repair. There were two of them, either one of which would ordinarily enable the servant to uncouple the two cars. One of them had its lever on the east side of the train, where the plaintiff was at work, and could be operated from that station. The other had its lever upon the west side of the train, and could be utilized only from that side. The

plaintiff first endeavored to uncouple the cars by the use of the device on the east side of the train while the string of cars was stationary. When the train was drawn tight, so that there was no slack between the cars, or, as the witnesses expressed it, "when the slack was tight," the cars could not be uncoupled either with or without the use of the levers. When the plaintiff first attempted to separate the cars the slack was tight, and consequently he could not pull the pin by the use of the lever. The engine then pushed the cars to the south, and as they moved along the plaintiff attempted several times to pull the pin by means of the lever upon which he still kept his hand, and failed. He then stepped in between the ends of the cars while they were moving at the rate of between two and three miles an hour, and tried to uncouple them by seizing the chain above the pin with his hands and raising them. The act of placing himself between the ends of the cars to uncouple them without first endeavoring to do so by the use of the lever on the opposite side was an act of negligence, because the use of that lever was a less dangerous method of separating the cars. Where there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method. *Morris v. Duluth S. S. & A. Ry. Co.*, 108 Fed. 747, 749, 47 C. C. A. 661, 664; *Gowen v. Harley*, 56 Fed. 973, 983, 6 C. C. A. 190, 200; *Coal Co. v. Reid*, 85 Fed. 914, 29 C. C. A. 475; *McCain v. Railroad Co.*, 76 Fed. 125, 126, 22 C. C. A. 99, 101; *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231; *Gleason v. Railway Co.*, 73 Fed. 647, 19 C. C. A. 636; *Cunningham v. Railway Co. (C. C.)* 17 Fed. 882; *English v. Railway Co. (C. C.)* 24 Fed. 906. Not only this, but if the plaintiff had adopted the less dangerous method, if he had proceeded to the other side of the train and had uncoupled the cars by the use of the west lever, he would not have walked in the space between the rails where his foot was caught, and he would not have been injured. Even if he had first vainly tried to operate that lever, he would not have walked over the space where he was hurt, and he would have escaped injury. So that there seems to be no escape for a reasonable man, who considers impartially these facts, from the conclusion that the plaintiff was guilty of negligence in refusing to use the lever on the west side of the train and in entering and walking between the moving cars for the purpose of uncoupling them, nor from the conclusion that this negligence directly contributed to his injury.

Counsel for the plaintiff, however, ably and persuasively urge several reasons why, in their opinion, the negligence of the plaintiff was not fatal to his recovery here. They call attention to the testimony of several witnesses to the effect that it was the custom or habit of the servants of the company to ignore the lever on the opposite side of the train, and to step in between the cars when they were moving, and uncouple them with their hands, when the lever on their side of the train would not produce this effect, and they insist that it was not negligence for the plaintiff to follow the ordinary course pursued by his associate operators in cases of this character. But "if a man exposes himself to a risk unnecessarily he is guilty of negligence,

although it be shown that other persons have done the same thing and escaped unhurt. The inherent quality of an act is not changed whether done by one or many." *Dawson v. Chicago, R. I. & P. R. Co.*, 114 Fed. 870, 882, 52 C. C. A. 286, 288. The danger of entering and walking between the moving cars was so imminent and obvious that no custom to do so unnecessarily could deprive the act of its inherently negligent character.

Counsel next say that, even if the plaintiff failed to exercise reasonable care to protect himself against the ordinary dangers of walking along the track between the cars and uncoupling them, he did not fail in the exercise of ordinary care to protect himself against the particular danger from the unblocked guard rail, because he was ignorant of its condition, and could not have been negligent about it. In support of this contention they cite, among other cases, *Smithwick v. Hall & Upson Co. (Conn.)* 21 Atl. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104, and *Choctaw, O. & G. Ry. Co. v. Holloway*, 114 Fed. 458, 464, 52 C. C. A. 260, 266. In the former case the plaintiff was instructed to work, handling ice, upon a certain portion of a platform which was guarded, and forbidden to labor upon another portion of the platform which was not guarded, lest he should slip off, fall to the ground below, and be injured. He disregarded his instructions, worked upon the forbidden portion of the platform, and was injured by bricks, which through the negligence of the master, fell upon him from an adjoining wall. In the latter case the plaintiff, a fireman, was guilty of negligence in riding upon an engine and tender with the tender foremost, without a light upon it, in the night. The negligence of the defendant was its failure to equip the engine with a brake, so that when the brake upon the tender was applied the engine crowded against it and injured the plaintiff, who was between the engine and the tender. The marked difference between these cases and the action under consideration is that in the former the negligence of the plaintiffs did not produce or increase the danger from the negligence of the defendants, while in the latter the plaintiff's negligence exposed him to the danger, and inflicted upon him the injury which he would not otherwise have suffered. In the former the workman upon the slippery platform was in as much danger from the falling bricks upon the part of the platform where he was instructed to work as he was upon the forbidden part, and the fireman upon the engine was in as much danger from the absence of a brake, with a good light upon the advancing end of the backing tender, or in the daytime, as he was when the tender was without a light in the night. In the case under consideration the act of the plaintiff in entering and walking between the moving cars exposed him to the danger from the unblocked guard, to which he would not otherwise have been subjected. In the former cases the plaintiffs' negligence was too remote to contribute to the injuries they suffered, while in the latter it was primal, proximate, and causal. While it is true in cases of little danger, when the negligence of the plaintiff is remote, and does not clearly contribute to his injury—as in the case of *Choctaw, O. & G. Ry. Co. v. Holloway*—that a servant may not be guilty of contributory negligence in exposing himself to a risk of which he is

ignorant, and of which an ordinarily prudent person would not have been aware, although he fails to exercise ordinary care to protect himself against known dangers, that rule is not of universal application. It is not applicable to cases in which the danger is known and great, and the negligence of the servant is clearly and directly contributory to the injury. An employé rides upon the pilot of an engine when there are cars on which he could ride with safety. He is injured through the negligence of the master, of the effects of which he was ignorant, when he would have suffered no harm if either he or the master had not been guilty of want of ordinary care. He cannot recover, because his negligence contributes to the injury, which the unknown negligence of the master concurred to cause. A pedestrian is about to cross a railroad. It is his duty to stop and look and listen before he crosses. It is the duty of the railroad company to ring a bell or sound a whistle to warn him of approaching trains. A train comes without whistle or bell, and gives no warning of its approach. The footman walks onto the railroad without stopping or looking along the track to the right or the left, and he is injured. He cannot recover, although he had no knowledge that the train carried no bell or whistle, and that no signal would be given, because his negligence contributed to the injury. A brakeman carelessly jumps onto the brake-beam of a moving car and seizes a handhold not placed upon it to sustain a strain of that character, when there are other handholds for the purpose of enabling men to climb upon the cars, which he ought to have used. He is ignorant that through the negligence of the master one of the screws which keeps the handhold he seizes in place does not secure it. He pulls out the screw, falls, and is injured. He cannot recover, because his negligence directly contributes to his injury. Indeed, where the plaintiff knows he is exposing himself to great danger, and his negligence directly contributes to his injury, it is not his want of care with reference to the particular negligence or defect that concurs to injure him, but his general breach of duty toward his master, his failure to exercise due care in view of the knowledge which he has, that is fatal to his recovery. When he knowingly departs from the line of duty, and unnecessarily causes his own injury by putting himself in a place which he knows to be dangerous, it is no excuse for his breach of duty that the place was more dangerous than he supposed it to be, or that he did not know the exact degree of the danger he carelessly incurred. One who voluntarily and unnecessarily exposes himself to a known and great danger, and thereby directly contributes to his injury, cannot escape the fatal effect of his contributory negligence because the negligence of the defendant which concurred to produce the injury, and of which he was ignorant, made the danger greater than he supposed it to be. *Railroad Co. v. Jones*, 95 U. S. 439, 440, 442, 443, 24 L. Ed. 506; *Railroad Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *Dawson v. Chicago, R. I. & P. Ry. Co.*, 114 Fed. 870, 52 C. C. A. 286; *Erie R. Co. v. Kane*, 118 Fed. 223, 235, 55 C. C. A. 129, 141; *Kresanowski v. Railroad Co.* (C. C.) 18 Fed. 229.

The case at bar falls within this rule. The place into which the plaintiff ventured was dangerous—so perilous that Congress had en-

acted a statute to relieve the plaintiff from the duty of exposing himself to its danger. The peril of the place arose in large part from unavoidable obstructions upon the roadbed as a path for a pedestrian, caused by the rails and ties, and from the necessity of constantly changing the bed, its ties and rails, in order to keep them in proper repair. The danger from the negligence of the defendant in permitting the guard rail to become and remain unblocked was of the same nature as, and was in reality a part of, the danger to which the plaintiff exposed himself when he stepped between the cars, and his ignorance of the particular danger from the unblocked guard rail, while he knew the general and imminent danger of the place, constituted no legal excuse for his want of ordinary care, and cannot be permitted to relieve him from its fatal effect. This view of this question is sustained by a moment's consideration of the fact that the contention of the plaintiff's counsel is suicidal. If, as they argue, the plaintiff is guilty of no actionable or contributory negligence in entering and walking between the cars because he did not know or anticipate the negligence of the defendant in leaving the guard rail unblocked, then by the same mark the defendant was guilty of no actionable negligence in leaving the guard rail unblocked, because it did not know or anticipate that the plaintiff would be guilty of the negligence of entering and walking between the moving cars to uncouple them, and, if he had not done so, he would not have been injured. The plaintiff then failed to discharge his duty to exercise ordinary care when he entered and walked between the moving cars to uncouple them, and this negligence directly contributed to his injury. But counsel for the plaintiff insist that his want of care was excusable, because it was necessary for him to pursue this course, and because his injury was inflicted after he had uncoupled the cars, and while he was attempting to retire from his dangerous position. But the cause of his presence between the cars, of his retiring from that place, and of the injury which he sustained while engaged in the latter act, was his negligence in placing himself between the cars. If he had not put himself between them, he would not have withdrawn himself from that dangerous station, and he would not have been injured.

It will be conceded for the purposes of this case, but it is not decided, that, where the levers furnished to uncouple cars cannot be made to accomplish that end, it is sometimes necessary for brakemen to go between the ends of moving cars to uncouple them, and that when that necessity exists it is not negligence for them to pursue this course. This concession brings us to the question whether or not there is any substantial evidence in the record before us that such a necessity existed in this case. The evidence was uncontradicted and conclusive that the plaintiff was guilty of contributory negligence when he entered between the cars, because it was then his duty to use the lever on the other side of the train before he stepped between them, and he had not tried to operate that lever. Hence the burden was upon the plaintiff to establish the necessity for entering between the cars—a necessity which constituted his excuse for adopting that course. For this purpose the plaintiff testified that he

stepped in between the moving cars, and, after vainly endeavoring to pull the pin attached to the east lever, which he had attempted to operate, he took hold of the chain attached to the west lever with both hands, tried to pull it up, and failed, and that, if he had been on the other side of the train, he could not have uncoupled the cars by the use of the west lever because the coupler would not work. He also testified that there was no structural defect in the apparatus for uncoupling; that he did not discover what the trouble with it was; that the slack was tight when he tried the east lever, so that the pin could not then be drawn; that when he tried to draw the pin attached to the west lever he took hold of the chain about $4\frac{1}{2}$ feet above the ground, or at about the height of his breast, at a point where a man could use but a small portion of his strength in lifting; and in his written account of the accident, made about a month after it occurred, he stated, when referring to the east lever: "The second time I attempted to pull up this lever it worked all right, and I cut the car off. The slack mustn't have been out of the car the first time I tried it." It was the duty of the court below to take this question of the necessity of the plaintiff's walking between the cars from the jury unless there was substantial evidence of that necessity which would sustain a verdict that it existed. The plaintiff did not know that the west lever would not work when he committed his first breach of duty by entering between the cars, for he had not then tried to raise the pin attached to it by lifting up the chain or in any other way. The only means of knowledge which he ever acquired upon which to found his testimony that the west lever would not operate was his vain attempt to draw the pin attached to it by lifting on the chain with his hands at the height of his breast. When all the testimony upon this question of necessity is reduced to its last analysis, it rests on the single fact that the plaintiff could not pull the pin attached to the west lever by lifting on the chain attached to it with his hands at the height of his breast at the particular moment when he made the attempt, although the lever and its connections were free from defects, although he did not try to operate them, and although he did not ascertain or know what the trouble with them was. That single fact is too remote and inconsequential to warrant a finding that the west lever would not pull the pin. Many other facts, of which the record presents no substantial evidence, are indispensable to such a deduction, especially the facts that the long arm of the west lever was of the same length or shorter than its short arm, so that power applied to the long arm would have the same effect as, or less effect than, power applied directly to the chain; that one walking between cars could apply as much power by lifting with his hands at the height of his breast as he could when walking freely by the side of the train by applying his strength to the handle of a lever; and that the slack was not tight, and the time was opportune when the plaintiff lifted on the chain. The evidence was insufficient to warrant a finding of these facts, or of the fact that it was necessary for the plaintiff to go between the ends of the cars to uncouple them.

Our conclusion is that the plaintiff failed to exercise ordinary care when he walked between the moving cars for the purpose of uncoupling them without first endeavoring to do so by means of the west lever, which had been furnished to him by the company for that purpose; that this negligence directly contributed to his injury; that these facts appear so clearly from the evidence that all reasonable men in the exercise of a fair judgment must come to these conclusions; and that the judgment below must be affirmed. It is so ordered.

THAYER, Circuit Judge. I concur in the order affirming the judgment below. I am not prepared to say that the plaintiff was guilty of negligence because he did not try to lift the coupling pin by the lever on the opposite or west side of the train before stepping in between the tracks. In view of the situation, it is most likely that he could not conveniently go around to the west side of the train to reach the lever on that side, and that it would have occasioned considerable delay had he done so. For these reasons I am not willing to hold that it was his duty to have gone around to the west side of the train. I do agree to the proposition, however, that, where there are two means of doing a given act, by one of which the act may be done with comparative safety, while the other means of doing the act are dangerous, it is the servant's duty to choose the safer way, unless he is forced to choose the other by stress of circumstances. In the present case there was no defect, so far as appears, in the appliance for raising the coupling pin by the use of the lever on the east side of the car. The reason why the pin could not be moved by that lever when the plaintiff made the attempt was doubtless due to the fact that there was at the time no slack. If the plaintiff had waited for a favorable opportunity he could doubtless have lifted the pin by the use of that lever. He did not do so, but voluntarily placed himself in a position of great danger by stepping in between the rails. I think that the act of Congress, which was passed for the protection of brakemen, amounts to a legislative declaration that a brakeman ought not to step in between the rails to uncouple a car in a moving train; and when it appears that a brakeman has placed himself in such a situation unnecessarily, not being compelled to do so by stress of circumstances, and receives an injury, he is guilty of such negligence as prevents a recovery. The testimony in the case at bar, as I view it, shows that the plaintiff stepped in between the rails when the train was moving, without adequate excuse for so doing, and that this act on his part beyond controversy immediately contributed to his injury, and the court below properly instructed the jury that he could not recover.

(128 Fed. 540.)

LAUTERER v. MANHATTAN RY. CO.

(Circuit Court of Appeals, Second Circuit. February 1, 1904.)

No. 76.

1. WRONGFUL DEATH—ACTION FOR DAMAGES—RELEVANCY OF EVIDENCE.

Where plaintiff's intestate attempted to board a car on an elevated road at a station after the gate had been closed and the car was moving, and after being carried beyond the station platform fell and was killed, the absence of a railing or guard across the end of the platform cannot be considered a proximate cause of the accident, and evidence as to the construction of the platform was properly excluded, in an action to recover for the death.

2. RAILROADS—CONSTRUCTION OF STATIONS—NEGLIGENCE.

A railroad company is bound to exercise only such degree of care in the construction of its stations and platforms as is sufficient to protect passengers using ordinary care from injury.

3. SAME—INJURY OF PASSENGER—LIABILITY FOR FAILURE TO GUARD AGAINST PASSENGER'S NEGLIGENCE.

One who voluntarily and unnecessarily exposes himself to a known danger, by attempting to climb on board a moving car, assumes all risks of injury therefrom; and the railroad company is not chargeable with negligence, causing his injury, which results from his falling from the car because of the manner in which its station or platform is constructed.

4. SAME—STATE REGULATION—CONSTRUCTION OF STATUTE.

The New York statute (Laws 1890, p. 1126, c. 565, § 138), which provides that no train on an elevated railroad shall be permitted to start from a station until every passenger upon the platform desiring to enter the cars shall have done so, unless due notice has been given that the cars are filled, must be given a reasonable construction, and cannot be held to require gates of cars to be opened after they have been closed and a signal to start given, or after they have actually started, because people may thereafter come onto the platform and desire to take the train, which in many cases of daily occurrence would wholly prevent the operation of trains.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the United States Circuit Court for the Southern District of New York, entered in favor of defendant on a verdict of a jury.

F. E. M. Bullawa, for plaintiff in error.

Henry W. Taft, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Plaintiff, as administrator, brought this action to recover damages suffered by reason of the death of his son, who was fatally injured by being crushed between the station of defendant's railway at 169th street and Third avenue and a southbound train of cars. Beyond the southerly end of the main platform at this station is a ledge 16¾ inches wide, sloping from the side of the station house toward the track. It was not separated from the end of the platform by any rail or guard. Above this ledge the distance between the body of the station house and the body of a car on the southbound track is about 21 inches. The accident happened on the

morning of December 22, 1899, at about 20 minutes past 7, when a southbound train had stopped at the station with the rear gate of its forward car about on a line with the end of the station building, facing the platform, from which point said ledge extends.

In view of the extraordinary claims asserted in support of the assignments of error, it becomes necessary to summarize the testimony as to the circumstances attending the accident.

Miss Wurtz testified that on the morning in question, as she opened the door of the station, her attention was attracted to decedent by seeing him hurrying out, and she stepped aside to let him pass; that he brushed past her, and "when he started to run to catch the car the forward gate of the second car was already closed." She further testified as follows:

"There was not any one on the platform besides myself. * * * The last gate of the first car was open, the first gate of the second car was closed. The car was not in motion. The young man placed his foot on the last platform of the first car. He placed his foot on the car. The car was not in motion."

Joseph G. Frost testified that he was acting as conductor on the morning in question, but that he was no longer in the employ of the Manhattan Railway Company; that he duly stopped at said station, took on all the passengers there, closed both gates, gave the signal, and started the train; that, just as the train started, deceased came rushing out, slammed the door and stood there; that a porter held up his hand, and said, "Too late"; that deceased stood there about a minute to get back his breath, and looked at him; that he (Frost) also said, "Too late," and then, all of a sudden, deceased made a dash around the porter, got hold of the stanchion of the car, and got about one-half of his foot on the step over the edge of the platform of the car; that, as soon as he (Frost) saw this, he quickly opened the gate and tried to pull him in, but, before he could do so, deceased turned around and lost his hold, and went down between the car and the station house. He further testified that the gate was closed and the train in motion before deceased attempted to get on, and that he (Frost) did not try to open the gate until after he saw that deceased had got his foot on the platform and that his life was in danger.

William Becker, an employé of Adams Express Company, testified that deceased came behind him, rushing up the stairs, ran by him, pushed him aside, got a ticket, dropped it in the box, ran right ahead past the first door, and swung open the second door; that he (Becker) stood still; that both gates were closed; that, when the cars had gone about two feet, deceased made a leap for the back end of the first car, and the car went a couple of feet, and he slipped and went down between the two cars; that he saw the conductor grab for the deceased to try to pull him on the platform; and that he thought the conductor opened one of the doors.

There was no other testimony as to the manner in which the accident happened, except that of one witness to the effect that she stepped aside to let deceased buy a ticket, because he seemed to be in a hurry.

We think it doubtful whether it would have been error for the court to take the case from the jury on the ground that the practically undisputed evidence conclusively showed that the accident was the direct result of the negligence of the deceased. *Elliott v. Chicago, Milwaukee & St. Paul Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, and cases cited.

The testimony of Miss Wurtz, as to the last gate of the first car being open is somewhat indefinite as to time, especially in view of the fact that her attention was diverted part of the time by reason of her turning to let the young man pass and to call to a friend who was with her. But the court gave plaintiff the benefit of the doubt, and submitted the case to the jury, charging them on this branch of the case as follows:

"If the gate of either platform was open at the time the young man attempted to board the car, it was to a certain extent an invitation to him to enter, and, if the car started before the gate was closed, the defendant was guilty of negligence."

Despite this instruction, counsel for plaintiff has assigned as error the refusal of the court to charge that "the defendant was bound to exercise all the care and skill which human prudence and foresight could suggest." So far as concerns plaintiff's claim that the car was negligently started, the court assumed this perfectly well-settled obligation of law as binding upon the defendant, and in effect charged that, no matter how much care and skill might have been exercised by defendant, if it started the car before the gate was closed, it was negligent.

Error is further assigned to the refusal of the court to receive any evidence concerning the construction of the platform. The theory of counsel for plaintiff on this point seems to be that the court should have admitted evidence as to the absence of a guard or railing shutting off the space beyond the platform, and should have charged the jury that the absence of such railing was negligence. This position is manifestly untenable. It is not the province of a court or jury to reconstruct the defendant's stations upon such theoretical suggestions. If such railing had been provided, and a person had been killed or injured by striking against it, we think it might have been quite as plausibly argued by counsel that the presence of said railing was the cause of the accident, and that, if the space had been left open, such person might have escaped serious injury, by being permitted to fall on the platform ledge, instead of being thrown against the obstruction.

But the vital objection to the evidence offered is that it appears beyond question that the construction of the platform was not the proximate cause of the injury. In support of his contention that the absence of said railing was the proximate cause of the accident, counsel for plaintiff has cited various cases decided in the courts of this state, and especially relies on *Ellis v. New York, Lake Erie & Western Railroad Co.*, 95 N. Y. 546, and *Lilly v. New York Central & Hudson River Railroad Co.*, 107 N. Y. 566, 14 N. E. 503. But in the *Ellis Case* it was held that the immediate effect of the negligent failure of the railroad company to provide buffers on its car "was to put the

car in such condition that, in case of collision at the rear, its body must be impelled against the preceding car with a force to which it could offer no resistance, and therefore its absence was the 'causa causans,' * * * the proximate cause of injury." In *Lilly v. New York Central & Hudson River Railroad Co.*, supra, a divided court, "after considerable reflection" and "with some hesitation," in a "border" case, held that, where plaintiff was knocked off a car through the negligence of servants, the question whether "the failure to have the brakes in good condition does bear such a relation to the happening of the accident as to make it a question of fact for the jury to determine, upon all the evidence in the case, whether the injury would have occurred if the brakes had been in good order and properly set." In each of these cases the defendant sought to escape liability for negligent failure to provide proper appliances or a safe place, by invoking the protection of the fellow servant rule, and the court refused to allow exemption on that ground.

But we are not here concerned with the decisions of the courts of this state on the question of proximate cause, but with the rule in the federal courts. As was said by the New York Court of Appeals in discussing this doctrine in *Condict v. Grand Trunk Railway Co.*, 54 N. Y. 500:

"The rule adopted in Massachusetts and Pennsylvania was also applied in *Railroad Company v. Reeves*, 10 Wall. 176 [19 L. Ed. 909]. Those decisions are in direct conflict with the law as settled in this state, and cannot control the decision of this case."

If counsel for plaintiff had wished to avail himself of a rule such as he claims is established in the New York courts, he was at liberty to bring this action there, instead of resorting to the federal courts.

Counsel for plaintiff pressed upon our attention in the argument of this exception the case of *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. There the court says:

"Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 M. & W. 546), that the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

And, subject to said qualification as to reasonable care and prudence, the court approved the following charge:

"Turning, now, to the conduct of Smith, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, you will understand that, no matter how negligently the company ran this train, or how unreasonably they neglected to provide sufficient safeguards at the crossing, if he brought his death upon himself by his own negligence, his administrator is not entitled to a verdict in this suit."

In the case at bar it cannot be claimed that any negligence of defendant was the primary cause of the injury, because the jury have found as a fact that deceased attempted to board a moving train after the gate had been closed. He is thus brought within the uni-

versal rule that a person who seeks to recover for a personal injury sustained by another's negligence must not himself be guilty of negligence that substantially contributed to the result. "Where the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened, he cannot recover." *Railroad Company v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

But, even if it be assumed that the result of plaintiff's negligence might have been different, if the defendant had provided a railing, yet the failure to provide such railing does not show the failure to exercise reasonable care and prudence. The defendant is not required to provide against accidents resulting either from the reckless disregard by passengers of its reasonable rules, or through their negligent heedlessness of their personal safety. It is only bound to exercise such a degree of care and prudence as is sufficient to protect the ordinary passenger using ordinary care on his part. Here deceased, having voluntarily and unnecessarily exposed himself to a known danger, must be held to have assumed all risks of injury which a careful and prudent person would apprehend as likely to flow therefrom. *Motey v. Pickle Marble & Granite Co.*, 74 Fed. 155, 20 C. C. A. 366; *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Chicago, St. Paul, M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582.

When the negligence of the injured plaintiff is the efficient cause of the accident, defendant is not liable in negligence for any act or omission, where no injurious consequence could reasonably have been contemplated as a result of such omission or act. *Scheffer v. Railroad Co.*, *supra*; *Railroad Co. v. Reeves*, *supra*; *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N. E. 531; *Lilly v. New York Central & Hudson River Railroad Co.*, 107 N. Y. 575, 14 N. E. 503. Furthermore, a defendant is not liable, even where it is negligent, provided such negligence is not the proximate cause, but merely a remote cause or condition of the accident. *Railroad Company v. Reeves*, *supra*. "But where, upon all the evidence, the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule, the same as in cases where there is no sufficient proof of negligence. *McDonald v. Snelling*, 14 Allen, 290, 299 [92 Am. Dec. 768]. In *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122, Blackburn, J., said: 'I do not think that the question of remoteness ought ever to be left to a jury. That would be in effect to say that there shall be no such rule as to damages being too remote.' It is common practice to withdraw cases from the jury, on the ground that the damages are too remote." *Stone v. Boston & Albany Railroad*, 171 Mass. 543, 51 N. E. 4, 41 L. R. A. 794, and cases cited.

Where the question of proximate cause is in doubt, it should be submitted, under appropriate instructions, to the jury; but, where it is not a matter of doubt, it is a question of law for the court. *Elliott*

v. Chicago, Milwaukee & St. Paul Ry. Co., *supra*; Southern Pacific Company v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485. In the case at bar there was no question of fact for the jury because, in view of the law already stated, the accident was merely a condition of the proximate cause, and is not one which might reasonably have been foreseen. As Mr. Pollock on Torts says, in discussing proximate cause:

"It follows that if, in a particular case, the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

See Scheffer v. Railroad Company, *supra*; Milwaukee & St. Paul Ry. Co., v. Kellogg, *supra*.

In the latter case the Supreme Court says as follows:

"In order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

It follows that, if the court had submitted to the jury the question as to whether defendant was negligent in failing to provide a railing at the end of the platform and they had found thereon in favor of plaintiff, it would have been the duty of the court to set it aside.

Error is further assigned to the refusal of the court to charge as follows:

"If deceased had deposited his ticket and was on the platform before the train had started, it was the duty of the conductor to have held the train until plaintiff's intestate had opportunity to board the train."

This assignment of error is founded upon the provision of section 138 of the railroad law of the state of New York (chapter 565, p. 1126, Laws 1890), and section 419 of the New York Penal Code.

Section 138 provides as follows:

"All trains upon elevated railroads shall come to a full stop before any passenger shall be permitted to leave such trains; and no train on such railroad shall be permitted to start * * * until every passenger upon the platform or station at which such train has stopped, and desiring to board or enter such cars, shall have actually boarded or entered the same, but no person shall be permitted to enter or board any train after due notice from an authorized employee of such corporation that such train is full and that no more passengers can be then received."

Section 419 imposes a penalty upon—

"Any conductor, brakeman or other agent or employee of an elevated railroad, who:

"(1) Starts any train or car of such railroad, or gives any signal or order to any engineer or other person to start such train or car, * * * before every passenger on the platform or station at which the train has stopped, who manifests a desire to enter the train has actually boarded or entered the same, unless due notice is given by an authorized employee of such railroad that the train is full, and that no more passengers can then be received."

And section 139 of said railroad law provides as follows:

"Every car used for passengers upon elevated railroads shall have gates at the outer edges of its platforms, * * * and every such gate shall be kept closed while the car is in motion; and when the car has stopped and a

gate has been opened, the car shall not start until such gate is again firmly closed."

Counsel for plaintiff asserts in his brief that:

"The deceased was entitled to act upon the belief that the defendant's conductor would open the gate of the car and give him an opportunity to board before permitting the car to start, since he was upon the platform manifesting a desire to enter before the car had actually started."

The court was not bound to charge said request. There was testimony tending to show that, after the gate was closed, deceased rushed out on the platform, and that, when the porter and conductor said, "Too late," he stood still until after the train had started. If the jury believed this evidence, deceased did not "manifest a desire to enter the train" until after it had started.

Furthermore, this court must take judicial notice, from daily experience, of the practical operation of the trains of the elevated railway. If the foregoing provisions are to be interpreted to mean that no train can start until every passenger on the platform, desiring to enter such cars, shall have entered the same, the elevated railway could not run. We all know that in the rush hours of the day there is a continual line of prospective passengers on the platform, signifying, with various degrees of energetic insistence, their desire to enter such cars. If such passengers are "entitled to act on the belief that the conductor will open the gate" after it has been closed, and the conductor should thus act, the railroad would be involved in a dilemma between stopping the car until such gate could be again firmly closed, or inviting intending passengers to assume a dangerous position at the moment when the car was starting. We do not understand that any such impracticable construction has ever been put upon the railway law of this state, and we certainly should not feel disposed thus to interpret it or apply it to the facts found herein.

There is no merit in any of the assignments of error. The judgment is affirmed.

(128 Fed. 546.)

ERIE R. CO. v. LITTELL

(Circuit Court of Appeals, Second Circuit. January 27, 1904.)

No. 71.

1. TRIAL—EXCEPTIONS TO CHARGE—FEDERAL PRACTICE.

It is the well-settled rule of the federal courts that all exceptions to a charge must be specific and be taken before the jury retires. A general exception to several propositions, either given or refused, will be overruled, if any one was correctly given or refused.

2. SAME.

Counsel, who before the retirement of the jury requested the court to indicate which of the several specific requests to charge had been given, and which refused, which the court then refused to do, is entitled to be heard on exceptions taken to the refusal of each separate request, identified by its number, having made them as specific as the situation permitted.

3. CARRIERS—ASSUMPTION OF RECEIVERS' CONTRACTS BY PURCHASER OF RAILROAD—TICKETS SOLD BY RECEIVERS.

A conveyance of a railroad on foreclosure sale, subject to all outstanding contracts made and obligations incurred by the receivers, which were

assumed by the purchaser, bound such purchaser or his grantees to accept tickets which had been sold by the receivers for the carriage of passengers over the road, and which were outstanding and unused at the time of the sale. Wallace, Circuit Judge, dissenting.

4. SAME—ERROR IN SALE OF TICKET—EJECTION OF PASSENGER.

When a passenger has purchased a ticket from a railroad company, purporting to entitle him to passage to a particular place, and has undertaken his journey therefor, and there is nothing on the face of the ticket, and no prior knowledge or notice of rules of the company, which would make such ticket invalid, brought home to the purchaser, he is rightfully a passenger on the train, and the company is liable in an action to recover damages for his ejection.

5. SAME—WRONGFUL EJECTION OF PASSENGER—RIGHT TO MAKE RESISTANCE.

A passenger, who is rightfully on a railroad train, has a right to refuse to be ejected from it, and to make sufficient resistance to denote that he is being removed by compulsion and against his will.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error by defendant in the court below to review the rulings, refusals to charge, and certain portions of the charge of the United States Circuit Court for the Southern District of New York on the trial of an action at law brought by Isabella M. Littell, a resident of the state of New Jersey, against the defendant, to recover damages for having been put off its train while a passenger thereon between New York City and Hohokus, N. J.

F. B. Jennings, for plaintiff in error.

Franklin Pierce, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. On the morning of November 18, 1899, the plaintiff purchased a ticket from Hohokus to Paterson and return. After having stopped at Paterson, she left there for New York in the afternoon of the same day, having purchased a ticket from Paterson to New York and return. That night she left New York by the 10:30 train for Hohokus. When the conductor demanded her ticket, she handed him a ticket, numbered 118, and which read as follows: "New York, Lake Erie & Western R. R. Co. This ticket at reduced fare is only valid for one continuous passage from New York to Hohokus. W. C. Robinson, General Passenger Agent. Excursion." Upon its back it was stamped: "New York, Lake Erie & Western Railroad Company." The date of the issuance of the ticket had been stamped upon its back, but it was so dim that it could not be made out.

The testimony of the plaintiff as to what occurred thereafter is substantially as follows: The conductor refused to accept the ticket, saying it was no good, had been bought in 1893, and that said railroad had gone out of existence. Plaintiff replied that this was the same Erie Railroad on which she had traveled for 35 years, that she had bought this ticket for that road, and suggested that he should

¶ 5. See Carriers, vol. 9, Cent. Dig. § 1452.

refer the question to the superintendent, and, if she was wrong, she would pay another fare and exonerate him. She also gave him her name and address, and showed him her commutation ticket, and he went away. Later he came back and told her she would have to pay her fare or get off, and, after stopping at the next station for some time, he came to her and told her he had ordered two policemen to come in and arrest her. She then protested against being thus put off the train, and offered the return portion of the other ticket she had purchased that day; but he said, "I won't have it," and struck her hand down. Later, and while the train was still in motion, she offered to pay her fare, but he refused to accept it. At Passaic the two policemen boarded the train, the conductor put his arm around her body, the policemen took hold of her arms, the conductor threw her forward on the front seat on her knees, striking her chest against the top of the seat, and they pushed her through the car, out onto the platform. She only resisted removal to the extent of holding onto the arms of the seats, which she was obliged to do in order to save herself from falling on the floor of the car. She tried to hold onto the rail, but her hand was struck and wrenched free, and she was dragged to the ground. The policemen took her to the police station, where the sergeant examined all her tickets, and told her they (the police) could not hold her, and that she could catch the 1:20 a. m. train for Hohokus, which she did, arriving there after 2 o'clock in the morning.

The evidence introduced by defendant contradicted the plaintiff's testimony as to the tender of the other ticket and of the fare, and as to the amount of force used in ejecting her from the car; but all of her material statements were corroborated by other testimony. The jury rendered a verdict in favor of the plaintiff for the sum of \$2,000 damages.

Counsel for plaintiff contends that certain assignments of error, because of the court's refusal to charge as requested by defendant, are insufficient, because the exceptions taken thereto were general and indefinite. The well-settled rule in the federal courts is that all exceptions to the charge must be definite, and must be publicly taken before the jury retires, so as to challenge the judge's attention to each proposition of law as it is presented, and enable him to exercise his right to modify any misstatement or error in said charge. *Park Bros. & Co. v. Bushnell*, 60 Fed. 583, 585, 9 C. C. A. 138; *Hodge v. Chicago & A. Ry. Co.*, 121 Fed. 48, 52, 57 C. C. A. 388. And, where only a general exception is taken to several propositions submitted to a jury or refused upon requests, the exception will be overruled, provided any of the propositions be correct. *Newport News & Mississippi Valley Co. v. Pace*, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887; *Hodge v. Chicago & A. Ry. Co.*, *supra*. But the record shows that in the case at bar counsel for defendant was confronted by conditions which precluded the possibility of taking such distinct and several exceptions in accordance with the prevailing practice. Before the jury retired he called the attention of the court to his specific requests, asked the court whether it had indicated which were charged and which were refused, and suggested that he

(the counsel) ought to indicate before the jury retired the portions of the charge to which he wished to except. The judge stated in reply that he did not think he would then go through the requests to any extent, that they were refused except so far as covered in the charge, and that he (the judge) would like to have the jury go out and attend to their duties. Thereupon counsel for defendant was permitted to take his exceptions after the jury retired.

That the judge had not indicated in writing on said requests which of them he had refused to charge is evident from his subsequent statement that he could not tell which they were. But counsel for defendant thereupon distinctly excepted to the refusal to charge each separate request, identifying it by its number, so far as the same had been refused and had not been covered by said charge, and the judge allowed said exceptions, saying, "Unless I have absolutely left out something by accident." It does not appear that anything was accidentally or erroneously omitted from the charge. But, in any event, counsel for defendant is entitled to be heard on his exceptions to said refusals to charge. He had seasonably called the attention of the court to the usual method of procedure; the judge had refused to avail himself of the opportunity thus offered to supply the omission of any material statement in his charge, and had thus obliged counsel to postpone the definite statement of his exceptions until it was too late to correct any errors; and counsel for defendant at the first possible moment had stated his several exceptions as distinctly as the situation permitted. We are satisfied that said exceptions, under the circumstances, were sufficient.

Counsel for defendant requested the court to charge the jury that said ticket did not entitle plaintiff to passage, if it was issued by the New York, Lake Erie & Western Railroad Company, or was issued prior to December 1, 1895. The court refused said request, and charged the jury as follows:

"If that ticket was issued by the New York, Lake Erie & Western road, I think that the Erie Railroad Company was bound to honor it, unless you shall find, upon the testimony before you, that it was issued by the original company more than six years prior to the time that an attempt was made to use it."

To this charge, and to the refusal to charge as above, the defendant duly excepted. The court also charged, as requested by defendant, as follows:

"If the jury find that the ticket in question was sold prior to November 18, 1893, the same was outlawed, and the defendant was justified in refusing to accept the same without incurring any liability therefor, and the jury must find that the ticket did not entitle plaintiff to passage."

The questions are thereby raised as to the relations existing between the New York, Lake Erie & Western Railroad Company and the defendant, and the obligations assumed by the latter. Counsel for defendant contends that as the ticket was issued by the New York, Lake Erie & Western Railroad, and as this railroad had been sold under foreclosure of its mortgage, and was subsequently purchased by this defendant, it (the defendant) was not responsible for the contracts of said mortgagor, such as are evidenced by this ticket, but that such contracts were

subordinate to the mortgage, and were cut off by its foreclosure. Counsel for defendant further contends that, as it did not acquire title to or take possession of said railroad until December 1, 1895, it was not bound to accept any ticket sold prior to that date.

It appears, from the record of the proceedings whereby the defendant acquired title to the property and franchises of said New York, Lake Erie & Western Railroad, that from July 25, 1893, until November 11, 1895, said New York, Lake Erie & Western Railroad was in the hands of receivers appointed by this court; that on said date, by virtue of a decree of this court, said property was transferred by the special master of the court to certain individuals, and was by them transferred to this defendant. The indenture under which said transfer was made to defendant provided that said property and franchises were conveyed to the defendant—

"Subject, also, to all contracts heretofore made, or liabilities heretofore incurred, by John G. McCullough and Eben B. Thomas, receivers appointed in the consolidated cause aforesaid, and to all their acts in connection with the said premises, franchises, and property, so far as the said contracts or liabilities are still outstanding and unsatisfied, which said contracts, liabilities, and acts, as well as all and every the covenants and liabilities made or incurred by the said parties of the first part hereto, in or by reason of said deed executed by the said special master as aforesaid, the said party of the second part hereby assumes, and from and against the same does hereby covenant to and with the said parties of the first part to indemnify and save them, and their heirs, executors, and administrators, harmless."

The jury, under the instructions of the court cited above, have found as a fact that said ticket was issued subsequent to November 18, 1893, and therefore subsequent to the date when the receivers took possession of the road. The obligation to accept and honor this ticket, if issued between November 18, 1893, and November 11, 1895, was one of the outstanding and unsatisfied contract obligations of the receivers expressly assumed by the defendant as one of the conditions on which it acquired title. If it was issued after said date, it was a valid and subsisting contract between plaintiff and defendant. The foregoing exceptions must therefore be overruled.

The refusal of the court to charge that the ticket was not good over the road of the defendant is assigned as error on the further ground that there was no sufficient evidence to go to the jury of its sale subsequent to May, 1893. It is true that Tonkin, who was the station agent at Hohokus in 1893, testified that, while he could not state when the ticket was sold, he was sure it was sold prior to May 1, 1893, and that the plaintiff's statement that she bought said ticket on March 9 or 10, 1898, was only corroborated by her other testimony. But the book, which it was said would have contained a record of the sale of said ticket, No. 118, had been destroyed, and it was admitted that there were two different series or sets of tickets similarly numbered, and that after the defendant took possession of said road it continued for a considerable period to sell the said tickets of the New York, Lake Erie & Western road. Defendant's witnesses testified that such tickets were always stamped with the stamp of the Erie Railroad. The ticket in question was not thus stamped. The plaintiff testified that she bought said ticket about March 9 or 10, 1898, using the other part to go to New York. She supported this statement by her testimony that,

prior to March, 1898, she had lived at Waldwick; that in March, 1898, she went to the house which she had rented in Hohokus to have some work done, and on that occasion purchased said ticket; and she stated that her failure to use the return portion on previous trips was due to her having laid away the ticket case in which she had placed it. In these circumstances, we think the jury were justified in finding, upon all the evidence, that said ticket was purchased on a date subsequent to November 18, 1893, and therefore subsequent to the date at which the receivers took possession of said road.

Error is further assigned to the refusal of the court to charge that, if plaintiff presented an invalid ticket, the conductor was justified in ejecting her from the train; that if the plaintiff had money to pay her fare, or another valid ticket, and she failed to pay such fare or surrender said ticket, she could only recover for its value; and that if originally she refused to pay her fare, such refusal was not cured by her subsequent offer to pay. These contentions are disposed of by the finding of the jury, upon sufficient evidence, that said ticket was valid. Besides, as already stated, she testified that she attempted to comply with these suggested requirements while the train was in motion.

Error is further assigned to the charge of the court that it was immaterial that the conductor had been instructed by defendant to refuse tickets issued by the New York, Lake Erie & Western Railroad. Counsel for defendant contends that, even if the station agent improperly sold plaintiff a wrong ticket, she would have her redress therefor in a proper action, but that such ticket would not entitle her to ride without paying her fare. The finding of the jury that the ticket was valid dispenses with the necessity of discussing this contention at length. The rule is well settled that when a passenger has purchased a ticket purporting to entitle him to passage to a particular place, and has undertaken his journey therefor, and there is nothing on the face of his ticket, and no prior notice or knowledge of rules of the railroad company, inconsistent with the statements on said ticket, brought home to the purchaser, he is rightfully a passenger on the train, and the railroad company is liable in this form of action for his expulsion. *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 69, 12 Sup. Ct. 356, 36 L. Ed. 71; *Murdock v. Boston & Albany Railroad Co.*, 137 Mass. 293, 50 Am. Rep. 307.

Other assignments of error question the correctness of the refusal of the court to charge that plaintiff was not entitled to recover any damages sustained from her refusal to leave the car quietly, or by reason of her resistance to the conductor in his attempt to eject her. The plaintiff testified that she did not make "a great deal of resistance, except holding onto the arms of the cars. I had to hold on, or I should have been on the floor." Other witnesses testified that she held onto the arms of the seats to prevent being thrown down, and was pressing backward, while the three men threw her forward, and shoved and dragged her through the car. There was some testimony by defendant's witnesses that she went very quietly, and some testimony that she resisted forcibly while in the car, and it was proved that when she reached the platform she held onto the iron rail; she saying she "was compelled to do so." The court charged:

"That if she was lawfully upon that train of the defendant at the time when the ejection took place, she had a right to exercise the amount of resistance which was testified to by all the parties connected with it."

In *Erie Railroad Co. v. Winter's Adm'r*, supra, a passenger was wrongfully ejected from a train with such force that he suffered considerable physical injury. Counsel for plaintiff admitted that no more force was used in expelling plaintiff than was necessary to overcome his resistance. The Supreme Court affirmed a judgment for plaintiff for \$10,000, and upon the question here presented said as follows:

"If he was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that under such circumstances he was put off the train was of itself a good cause of action against the company, irrespective of any physical injury he may have received at that time, or which was caused thereby. *English v. Delaware & Hudson Canal Co.*, 66 N. Y. 454 [23 Am. Rep. 69]; *Brown v. Memphis & Charleston R. R. Co.* [C. C.] 7 Fed. 51; *Philadelphia, Wilmington & Baltimore Railroad v. Rice*, 64 Md. 63 [21 Atl. 97]."

This discussion disposes of all the assignments of error which were pressed on the argument of this case. We think that the charge of the court correctly and fully covered all the questions of law presented, that it was quite as favorable to the defendant as it had a right to request, and that there was no error prejudicial to the rights of defendant.

The judgment is affirmed with costs.

WALLACE, Circuit Judge (dissenting). If the ticket was sold while the receivers were operating the railroad, in my opinion the plaintiff was not entitled to recover. The defendant at that time had not come into existence, but was subsequently incorporated, and acquired the railroad by deed from vendors who had bought it at a foreclosure sale. In the deed the defendant covenanted to indemnify the vendors, and also the receivers, against contracts and liabilities outstanding. I cannot agree with the majority of the court that by force of that covenant the defendant became obligated to carry the plaintiff as a passenger who had purchased a ticket from the receivers. That covenant was exclusively for the benefit and protection of the vendors and the receivers, and not inuring to the benefit of the plaintiff. She could not derive any right of action founded upon it. *Austin v. Seligman* (C. C.) 18 Fed. 522; *Weiden National Bank v. Smith*, 86 Fed. 398, 30 C. C. A. 133, 137.

(128 Fed. 321.)

GREAT WESTERN MIN. & MFG. CO. v. HARRIS et al.

(Circuit Court of Appeals, Second Circuit. December 16, 1903.)

No. 12.

1. CORPORATIONS—RIGHTS OF CREDITORS—WRONGFUL DIVERSION OF ASSETS.

A corporation, which had endeavored without success to sell an issue of bonds at 60 per cent. of their par value, received an offer of 85 per cent. for the bonds with a bonus of stock equal to 50 per cent. of the bond issue. It accepted such offer, making an agreement with its stockholders by which they furnished the stock pro rata, and received therefor 25 cents out of every 85 paid by the bond purchasers. At the same time the corporation issued to them additional stock equal to a part of the amount sold, reciting as consideration therefor the previous making of permanent betterments on its property from net profits. *Held*, that such stock transaction did not affect the corporation, or the value of its assets, so as to entitle it or its bondholders or creditors to recover from the old stockholders the amounts so received by them as assets wrongfully withdrawn from the corporation; its effect, so far as creditors were concerned, being the same as though it had sold its bonds at 60 per cent.

2. RECEIVER—RIGHT TO SUE IN FOREIGN JURISDICTION.

A receiver of the property and assets of an insolvent corporation, appointed by a court in the exercise of its general equity powers, cannot maintain a suit to collect moneys in another jurisdiction, either in his own name or that of the corporation, nor can he be authorized by the court to do so, unless in the exercise of a power given it by statute or otherwise it has vested title in the receiver, or where the corporation, acting within its corporate powers, has vested him with such title or authorized him to sue in its name.

3. CORPORATIONS—CONTRACT WITH STOCKHOLDERS—SUIT TO ANNUL.

Neither a corporation nor a receiver suing in its name and behalf can maintain a suit to set aside a contract made between the corporation and all its stockholders. Such a contract can only be attacked by or on behalf of creditors who are shown to have been defrauded thereby.

4. SAME—DIVIDENDS RECEIVED BY STOCKHOLDER—LIABILITY FOR REPAYMENT.

A stockholder is not liable to creditors of the corporation for dividends received by him in good faith while the corporation was a going concern and solvent.

Appeal from the Circuit Court of the United States for the District of Vermont.

For opinion below, see III Fed. 38.

This cause comes here by cross-appeals from a decree of the United States Court for the District of Vermont in favor of the complainant for \$15,000, and dismissing all the other claims made in a bill brought in the name of the Great Western Mining & Manufacturing Company, a citizen of Kentucky, by L. C. Black, its receiver, by virtue of the authority vested in him under an order of the United States Circuit Court for the District of Kentucky, appointing him receiver of the property and assets of said company, and directing him to institute suits against the shareholders and directors of said company for the recovery of sums lost to said company by the withdrawal of certain moneys by its stockholders and officers by the issuance of stock to them with-

¶ 1. Stockholders' liability to creditors in equity, see note to *Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.

¶ 2. Suits by and against receivers of federal courts, see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.

¶ 4. See *Corporations*, vol. 12, Cent. Dig. § 869.

out consideration, and through negligence and mismanagement of its board of directors.

Harlan Cleveland, for complainant.

Brainerd Tolles, for defendants.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The complainant, a Kentucky corporation, by this bill asks for an accounting and damages from the estate of defendants' testator, B. D. Harris, who was a resident of Vermont, and was an officer, director, and stockholder in said corporation from 1883 to 1892. Other parties were named defendants in the bill, but no process was issued against them, and no other defendant appeared.

As found by the court below:

"This suit is not brought upon any statute of Kentucky, but, like *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, is founded upon the common-law liability for misfeasance and negligence in the performance by the testator of his duties as a director and president of the corporation about withdrawing and allowing the withdrawal of these moneys from the corporation."

At the close of the hearing the complainant claimed that the estate of B. D. Harris was liable as follows:

"(1) For the sum of \$75,000 as a joint and several liability of the directors and officers of the company, with interest thereon from January 11, 1890, the first date shown by the record that the \$75,000 had been taken from the company.

"(2) For \$45,000 as a several liability as stockholder, on account of the issue to himself, without consideration, on January 11, 1888, of one hundred and fifty shares, or \$15,000, of stock, and on April 22, 1889, three hundred shares, or \$30,000, of stock, to be accounted for, \$15,000 as of January 11, 1888, and \$30,000 as of April 22, 1889.

"(3) For the damages suffered by the company by reason of the issue to the other stockholders of the Great Western Mining & Manufacturing Company by B. D. Harris and the other officers and directors of the company on January 18, 1888, of three hundred and fifty shares, or \$35,000, of stock, and on April 22, 1889, of seven hundred shares, or \$70,000, of stock, without consideration, to determine which said damages and injury a reference should be had to a master.

"(4) For the dividends wrongfully paid out of capital stock between April, 1889, and July, 1892, as a joint and several liability of the directors and officers of the company so paying said dividends, and for the dividends paid B. D. Harris individually as a several liability of his estate."

As to these claims the court below finds as follows:

"All claims except as to the issues of \$50,000 of stock in April, 1888, and of \$100,000 of stock in 1889, and the \$75,000 received by the stockholders from the bond and stock transaction, have, on the argument, been waived."

Thus it appears that, while the action is bottomed on a common-law right, and, as to the claims insisted on in the court below, is for money damages only, the bill is in form one for equitable relief. The opinion of the court below accurately and succinctly states the facts concerning these transactions, as follows:

"The Great Western Mining & Manufacturing Company was a corporation of Kentucky, with a capital stock of \$200,000 in shares of \$100 each, of which the defendant's testator, a citizen of Vermont, held 600, and a brother of the

testator 600, bought in 1883 at \$30 per share, another person 440, another 300, another 52, and two others 4 each. The five largest stockholders were the directors, and the testator was the president. It had lands, mines, and transportation facilities in Kentucky, and largely produced and sold coal. It issued \$50,000 of new stock ratably to the stockholders in January, 1888, and it owed \$131,585.03 December 31, 1888. Negotiations for placing \$300,000 of mortgage bonds had been going on, and offers had been made for the sale of them at 60 per cent., without finding purchasers. A proposition was made by brokers to the directors April 18, 1889, for putting them on sale at 85 per cent., with a bonus of half as much stock as of bonds. At the annual meeting April 22d—

“The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following resolution was presented, and, after consideration, was adopted, to wit:

“Whereas, there have been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887 and 1888, more than \$160,000.00, all of which sum has been furnished from the net earnings of the company and fairly belongs to the stockholders of the company,

“Therefore resolved, that the directors of this company be, and hereby are, authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company, to be divided pro rata among the present stockholders of this company, as follows:

| | |
|----------------------------|------------|
| To B. D. Harris | 300 shares |
| G. D. Harris | 300 shares |
| John Carlisle | 220 shares |
| G. W. Carlisle | 150 shares |
| George S. Richardson | 26 shares |
| James C. Holden | 2 shares |
| L. Hinsdale | 2 shares |

“The matter of negotiating a loan for the benefit of the company was also taken up, and a resolution authorizing the loan to the amount of \$300,000, for which bonds were to be issued, was approved.”

“On the same day the directors voted: ‘That the president and secretary of the company shall arrange for the sale of the \$300,000 bonds, aforesaid, in their discretion, at the best price obtainable, and the proceeds thereof shall be applied to the cancellation and retirement of \$60,000 first mortgage 7 per cent. bonds, dated January 1, 1884, now outstanding; also to the payment of all floating indebtedness incurred up to the date hereof for materials and construction, and the balance shall be used by the directors for the best interests of the company.’ They also passed the following resolutions: ‘Whereas, at the annual meeting of the stockholders of this company a resolution was adopted requesting the directors to issue additional capital stock of this company to the amount of \$100,000.00, to be divided pro rata among the present stockholders, and based upon the fact that during the last five years more than \$160,000.00 of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company which belong to the stockholders of the company: Therefore resolved, that the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders in proportion to the amount of stock already owned by them, respectively.’

“A transaction took place among the stockholders as such and the directors as such, as shown by the following extracts from the records of the company:

“‘Proposition of Stockholders of the Great
“Western Mining and Manufacturing Company
“to the Directors of said Company.

“‘Whereas, the directors of the Great Western Mining and Manufacturing Company have taken steps to borrow the sum of \$300,000, to be used in payment of existing indebtedness of the company and to provide additional working capital, etc., and have authorized the President and Secretary to execute

bonds for said amount, and to negotiate the same at the best price obtainable; and

"Whereas, we are informed that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided that stock of the company, to the extent of fifty per cent. of the par value of the said bonds shall also be transferred to the several purchasers of said bonds; and

"Whereas, it is deemed to be inexpedient to issue any new stock of the company for such purpose, and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds:

"We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company, to the purchasers of said bonds, to wit:

"We will sell to the several purchasers of said bonds of the company stock of the company belonging to us in the amounts set opposite our names, respectively, and will furnish to the Secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchasers of said bonds, upon the understanding and agreement that we are to receive the sum of \$50 for each share of stock so sold by us out of the money paid for bonds, and said Secretary shall act as our agent in receiving said amounts, and shall pay us the same before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof.

"This action is not to be construed as a proposition to sell said stock to the company, but it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to be paid for by them to us, and the payment by them to the Secretary of this company for said bonds shall be regarded as a payment to us for said stock to the extent necessary to pay us therefor upon the terms above stated.

"In testimony whereof, we have hereunto set our hands, on this third day of May, 1889.

| | |
|--------------------------|------------|
| B. D. Harris | 450 shares |
| G. D. Harris | 450 shares |
| John Carlisle | 336 shares |
| Geo. S. Richardson | 39 shares |
| G. W. Carlisle | 225 shares |

Total 1,500 shares

"After full consideration of the proposition, the same was accepted, and the secretary was authorized to act as the agent for said stockholders in the proposed sale of their stock and the collection of the purchase money therefor, and directed to turn over the net proceeds of the sale of bonds into the treasury of the company."

"A mortgage was made, and \$300,000 of bonds bearing 6 per cent. semiannual interest were issued, dated June 1, 1889, and sold in several various amounts, with half as much stock transferred in blank, and deposited ratably by the stockholders with the treasurer, who delivered it with the bonds to the takers of them respectively. The stock of the testator was transferred at various times between September 7, 1887, and March 7, 1890. Of the money received by the treasurer for the bonds and stock, 25 per cent., being 50 per cent. of the stock, was paid by the treasurer to the several stockholders furnishing the stock. The testator furnished 450 shares of the stock, and received \$22,500 of the proceeds of the bonds and stock in that manner. All the stockholders received \$75,000, and the corporation retained \$180,000. The avails of the loan, \$225,000, were entered as such on the books of the corporation, and the \$75,000 paid to the stockholders was entered as an expense of the loan. The \$22,500 was sent to and received by the testator, and this bond transaction was closed in 1890. The business of the corporation was continued, debts were created, dividends were declared, and paid to those holding the stock that went with the bonds, but none to the testator upon his original stock after January 1, 1891; and interest coupons from the bonds were paid till 1892, when the receiver was appointed, on a creditors' bill, by the Circuit Court of the United States for the District of Kentucky. The mortgage was foreclosed

by intervention in that suit, and the property covered by the mortgage was sold for \$70,000, and the other property for \$5,666.67. The avails of the mortgaged property, after deducting expenses, were applied on the mortgage debt, leaving the remainder thereof, amounting to more than the face of the bonds still due. The other debts amounted to \$122,221.32."

The reasoning of the court, upon which it reached its conclusion, is as follows:

"The substance of the plaintiff's claim is for the withdrawal of the money received for the mortgage bonds, and not for the increases of stock, and the question of solvency would refer to the situation at the time of the withdrawal. The prior debts had been then, or soon were, paid, but the mortgage bonds were outstanding, and the avails of them were what paid the prior debts. They were debts of the corporation, and in view of the whole situation, as shown by the evidence, they amounted to as much at least as the corporation could at most pay, and the depletion of any part of the \$75,000 that came from the corporation would be more than it could spare. The increases of stock were far within the limits of the power of the corporation, and these issues of it ratably to the stockholders would in themselves work no harm. The stockholders would, as between themselves, own the corporate property in the same proportions as before. Outsiders would not be affected till reached. Then they would be entitled to stand upon their rights to protect themselves. The first increase of stock was made more than a year before there appears to have been any suggestion of using stock to effect a loan, and to have been entirely separate from the bond transaction. When made and ratably divided, it would not of itself affect at all the stockholders as between themselves or outsiders. If sold to others, whether it was valuable or not, or at a fair or unfair price, the corporation would not be peculiarly affected. If it brought 25 cents of the 85 cents on the dollar of the face of the bonds that the stock and bonds brought, that part would belong to the stockholder furnishing the stock, and not to the corporation; and the receiving of that by the stockholders would not be depleting the assets of the corporation. The bonds would not float at 60. The bonds and stock would at 85. The inference follows that the bonds brought 60 and the stock 25. The stockholders and directors agreed to this among themselves each with the others, and that would confirm the division, for, although directors may not contract away to any of themselves more than to others the property of the corporation to the detriment of creditors, they are not precluded from dealing fairly with any of their number in respect to what is his own. This deal may not have been fair to the takers of the bonds and stock for want of value to the stock, but the point here is whether there was a fair division between the corporation and the stockholders of the avails of the transaction as it was, fair or unfair, according to the proportion of the consideration furnished by each. The amount received for this issue of stock, in this view, was \$25,000, of which the defendant's testator received \$7,500 as the price of the stock furnished by him that did not come from the last issue, but had been divided to and became his before any negotiation of the bonds as well as any of his prior stock had. The last issue of stock was concurrent with the issue and negotiation of the bonds and stock, and that stock moved as much from the corporation to the new bondholders as if it had been issued directly to them, instead of through the prior stockholders to the bondholders. Neither the statement in the vote of this stock that it was based upon the expenditure of net earnings for permanent improvements, nor the provision in the proposal of the stockholders that the secretary should act as their agent in transferring the stock and receiving the money, nor the protest that the action should not be construed as a sale of the stock to the company, but should be regarded as a sale to the purchasers of the bonds, could alter the nature of the transaction, or its source, or its place, as a part of the consideration for the money received from the bondholders. The whole moved from the corporation, and the transaction wrought a depletion of assets of the corporation needed to make the bonds good, and to which the bondholders were entitled, if necessary, for the payment or security of the bonds. There was no agreement between the stockholders and the bondholders as to the price of the

stock nor otherwise, except among the stockholders themselves. As to the bondholders, according to the evidence, it was a mere bonus to float the bonds. The stockholders receiving the money took it with the risk of its being required to make the bonds good. It is so required, and the plaintiff, as receiver, represents the rights of the bondholders as creditors in respect to it. *Briggs v. Spaulding*, 141 U. S. 132 [11 Sup. Ct. 924, 35 L. Ed. 662]. The avails of this increase were \$50,000, of which the testator received \$15,000."

Great Western Mining & Mfg. Co. v. Harris' Estate (C. C.) 111 Fed. 38.

The court thereupon held that the testator's estate was liable for the amount of \$15,000 received by the testator through the last issue of stock. The court reached this conclusion upon the theory that the stock issue of 1889 was in so far a part of the bond transaction that the legal effect was the same as though the stock had been issued directly by the corporation to the purchasers, and that, therefore, to that extent, said issue operated as a withdrawal of the assets of the corporation. But this arrangement was made in fact as well as in form by the stockholders for the sale not of the capital stock of the corporation, but of the capital stock issued to and owned by them, respectively, as a method of disposing of the bonds. It would seem that, inasmuch as before said stock issue the stockholders owned the entire equity in the assets of the corporation, and all received their proportionate shares of additional capital stock, that the only reduction in value was the reduction in value of the shares previously owned by them. As is said by counsel for defendant in his brief:

"After the issue they [the stockholders] owned the same thing. They gained nothing and the corporation parted with nothing by the issue of additional stock. It merely placed in the hands of the stockholders an instrument whereby they could conveniently detract from the value of the shares of stock which they formerly held, in order to vest new and equal rights in the persons to whom they might transfer the new shares. Whatever of value passed to the purchasers of those shares was withdrawn, not from the assets of the company, but from the antecedent equity or interest which was vested in the stockholders making the sale. Taking the stock transaction by itself, it did not affect the company in any way. It merely diminished the relative interest in the corporation of those stockholders who engaged in it."

The People ex rel. The Union Trust Company v. Michael Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762.

But, irrespective of these considerations, the controlling question herein is as to the right of the receiver to bring this suit. The Kentucky court, in the exercise of its general equity powers, appointed him receiver of the property and assets of said corporation to hold and keep its property, and directed him to institute suit for the advantage of said company in his own name as receiver or in the name of the company.

In *Hale v. Allison*, 188 U. S. 56, 68, 23 Sup. Ct. 244, 47 L. Ed. 380, Mr. Justice Peckham, referring to *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, says:

"It was there held that an ordinary receiver could not sue in a foreign jurisdiction, and an elaborate examination was made by Mr. Justice Wayne of the principles upon which the decision was founded. In speaking of the right of a receiver appointed under a creditors' bill in New York to bring an action in a foreign state, it was said, in the course of the opinion, as to such a receiver: 'Whether appointed as this receiver was, under the statute of

New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation under his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extraterritorial power of official action; none which the court appointing him can confer with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done where his debtor may be amenable to the tribunal which the creditor may seek.' This statement has not been overruled or explained away by any subsequent decision of this court to which our attention has been called."

See, also, *Evans v. Nellis*, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173; *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839.

The order appointing the receiver herein did not, in terms, authorize him to institute suits in a foreign jurisdiction. Had it done so, his position would be like that of the receiver in *Hilliker v. Hale*, 117 Fed. 220, 55 C. C. A. 252, where this court said:

"He was made an arm of the court, with which the court attempted to reach outside its territorial jurisdiction; and the attempt, it seems to us, was futile. The court could not reach beyond the limits of its jurisdiction, through a receiver, any more than it could through a marshal or a sheriff."

It is clear, therefore, that this receiver cannot maintain this suit in this court as receiver. But it is urged that, irrespective of his right to sue as receiver in a foreign jurisdiction, he may maintain such suit in the name of the corporation. The preliminary question before us is not as to the right of the corporation to bring a suit in its own name, within or without the state of Kentucky. In *Glenn v. Marbury*, 145 U. S. 499, 511, 12 Sup. Ct. 914, 36 L. Ed. 790, the Supreme Court said:

"As this corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to those ends remained unimpaired."

The question before the court in that case was the technical one as to whether an assignee of a chose in action should sue in his own name or in that of the assignor, and the court held that under the common law prevailing in the District of Columbia said trustee could not maintain an action at law in his own name for a call or assessment of stock, but that such suit could have been maintained by him in the name of the company. The court states the rule to be "that a demand upon the stockholder to meet a call or assessment, by competent authority, must be enforced in the name of the person or corporation holding the legal title to the stock subscription, and to whom the promise of the stockholder was made." There the company had assigned by deed to trustees, for whom this plaintiff had been substituted, all its estate, including moneys payable, "whether on calls or assessments on the stock of the company" or otherwise, and the court had confirmed said deed, and entered an order for a call and assessment, and authorized said trustee to bring suit to collect said calls. The court,

therefore, in accordance with the rule laid down in *Booth v. Clark*, supra, and *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, held that the trustee, being vested with title by the voluntary act of the corporation itself by virtue of said assignment and the orders of the court pursuant thereto, was entitled to institute such suit in its name.

In *Hilliker v. Hale*, supra, this court considered the distinction between a receiver or trustee vested with a title which may be asserted anywhere and one who, as in this case, is a mere agent or officer of the court. Referring to the status of the receiver therein, we said as follows:

"We are further of the opinion that the plaintiff cannot maintain this action. He sues as receiver. His rights, if any, rest wholly upon the order and decree in the *Rogers Case*. Without regard to the nature of the claim asserted against the defendant, the plaintiff has no relation to that claim otherwise than through such order and decree. He is not the assignee of all or any of the creditors. He has no title to anything, so far as appears, except to his office as receiver. The order and decree, in terms, make him a mere agent of the Minnesota court. That court undertook to authorize him to sue nonresidents in other jurisdictions; moneys collected to be 'held by him subject to the further order of this court [the Minnesota court] in the premises.' The Minnesota court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and to bring it back to be disposed of as it might direct. If it had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title thus acquired, and sue upon such claim here, in accordance with the principles stated in *Association v. Rundle*, 103 U. S. 222, 26 L. Ed. 337. Apparently the court had no such power. Whether it had or not, it did not attempt to exercise it. It transferred nothing to the plaintiff. It merely appointed him its own agent to collect and hold subject to its order."

We think these considerations apply with equal force to the right of the receiver to maintain this suit in the name of the corporation. It does not appear that it has exercised its corporate powers so as to vest any title in the receiver or otherwise to authorize him to sue in its name. In the absence of such proof, the presumption is that he is acting without such authority. The sole authority shown by the bill is alleged as follows:

"That in proceedings in the United States Circuit Court for the District of Kentucky, L. C. Black, of Cincinnati, state of Ohio, was appointed receiver of the assets of your orator for the purpose of realizing upon the same for the benefit of its creditors, and by special order of said United States Circuit Court for the District of Kentucky he has been directed to prosecute this suit either in his own name or the name of your orator, as may be proper."

But if said court cannot send such an agent outside of its territorial limits to collect moneys as receiver, its attempt to exercise extraterritorial powers by directing such agent to proceed in the name of the corporation must be equally futile, except where the court by statute or otherwise is empowered to vest title in the receiver, or where the corporation, or the court, acting within its powers on behalf of the corporation or as the successor of its officers, has authorized such act. *Hilliker v. Hale*, supra; *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986.

But even if it be assumed that this receiver, by thus bringing suit in the name of this corporation by himself as receiver, can maintain an action on its behalf which he could not maintain as receiver only, it

is not clear how this assumption would help the complainant corporation. It is, in any event, bound by the rules of law regulating the relations of a corporation to its officers, and, between it and its stockholders and directors, by its contract and the acts done in pursuance thereof.

A creditor, on the other hand, may by appropriate legal proceedings avail himself of every existing legal right against the corporate officers or stockholders. A contract between a corporation and its stockholders that they should not be called on to pay therefor in full is good between the corporation and its stockholders. The creditor defrauded by such a transaction may have such contract set aside. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Clark v. Bever*, 139 U. S. 96, 111, 11 Sup. Ct. 468, 35 L. Ed. 88, and cases cited. "An agreement that the subscribers or holders of stock shall never be called upon to pay for the same may be good as against the corporation itself, but it has been uniformly held by this court not to be binding upon its creditors." *Handley v. Stutz*, 139 U. S. 417, 428, 11 Sup. Ct. 530, 35 L. Ed. 227; *Evans v. Nellis*, *supra*. So, too, a receiver, if duly authorized to institute such a suit, is the representative of all parties interested therein. He is appointed in behalf of all parties who may establish rights in the cause. *Booth v. Clark*, *supra*. He may, as the representative of creditors, disaffirm acts of the corporation, and sue to set aside transactions entered into in fraud of their rights. *In re Wilcox & Howe Company*, 70 Conn. 220, 39 Atl. 163.

It may be that the acts and misrepresentations of Carlisle, the manager of said corporation, or of the brokers through whom the bond transaction was carried out, were in fraud of persons who became creditors upon the strength of said representations, and that an appropriate suit may be brought by such creditors to recover therefor. But this right is one existing not in favor of all creditors of a corporation, but in favor of a particular class of creditors only, namely, those creditors who were defrauded by said transaction. *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Cook on Corporations* (5th Ed.) §§ 42, 46. This suit cannot be treated as one brought to annul the contract whereby said transaction was carried out by creditors who may have been defrauded thereby. Neither the bill filed in the Kentucky court nor the bill herein charges that any purchaser of bonds or stocks was deceived by said action of the corporation, and there is no evidence to that effect.

The complainant is bound by the allegations of the bill, and the contention on which it is based that this is a suit only in the right of the corporation independent of its creditors, and to which neither the receiver nor the creditors are parties. We are of the opinion that such a suit cannot be maintained by this corporation. In *Handley v. Stutz*, *supra*, the bill was filed by certain judgment creditors against a Kentucky corporation for a stock assessment against certain creditors, in circumstances similar to those in the case at bar. Referring to the claims of the bondholders who were to receive a certain amount of stock as bonus, the court holds that such transactions can only be impeached for fraud, and that only subsequent creditors who were en-

titled to enforce their claims against these stockholders, and trusted the company upon the faith of said increase of stock, could enforce their claims against such stockholders, and that no such equity exists in favor of creditors whose debts were contracted prior to such authorization. So, in *Coit v. Gold Amalgamating Co.*, supra, in a suit by a judgment creditor to enforce an alleged personal liability of the stockholders for fraud in issuance of unpaid stock, Mr. Justice Field, speaking for the court, said:

"The plaintiff had placed no reliance upon the supposed paid-up capital of the company on the increased shares, and therefore has no cause of complaint by reason of their subsequent recall. Had a new indebtedness been created by the company after the issue of the stock and before its recall, a different question would have arisen. The creditor in that case, relying on the faith of the stock being fully paid, might have insisted upon its full payment. But no such new indebtedness was created, and we think, therefore, that the stockholders cannot be called upon, at the suit of the plaintiff, to pay in the amount of the stock, which, though issued, was soon afterwards recalled and canceled."

It would seem that, inasmuch as it was agreed as part of the contract between the corporation and its stockholders that the stock should be deemed full paid, the stockholder could not be held liable in a suit by the corporation wherein it seeks to annul its contract as a fraud upon the general creditors of the corporation. The language of Mr. Justice Peckham in *Hale v. Allison*, supra, referring to a contract of subscription, is illustrative of the relation of the parties. The court says:

"Assuming the contractual character of the subscription to the stock of the corporation, the right of the receiver to maintain this suit is not thereby made plainer. The contract may have been to pay, in the event of its insolvency, to the creditors of the corporation, the amount for which the shareholder might be liable up to the par value of his stock. That was a contract in behalf of the creditor, with which the corporation had nothing to do, and the statute did not make this liability assets of the corporation or confer upon the receiver appointed in the case the right to proceed to enforce it."

We have, then, in this case, a suit brought in the name of a corporation, wherein it seeks to repudiate, on the ground of fraud, certain contracts made by it with its officers and stockholders, which, so far as the record shows, was lawful in its inception. Whether it could in any case disaffirm its contract, and seek to recover the fruits thereof, without restoring the parties to their original status, it is not material to inquire. *Scovill v. Thayer*, supra. It is clear that it is not the proper party to maintain this suit. The corporation was a party to the contract, whereby it was agreed that no payment should be required upon said issues of stock. The evidence shows that the bonds could not be floated without a stock bonus, and, there being no stock in the treasury of the company, the stockholders contracted with said company to sell to the bond purchasers directly their own stock, pro rata, in order to provide such bonus. It may be noted in this connection that there is some evidence tending to show that the officers of the company made this contract in good faith, believing it to be for the benefit of the company. So far as these defendants' testator is concerned, while there are some expressions in his letters which are capable of being interpreted as evidence of an intent to secure a bene-

fit to himself as stockholder at the expense of the corporation, yet the evidence, taken as a whole, falls far short of proving that he was a party to any unlawful scheme, or believed that the plan which was adopted for floating the bonds and selling his stock to the purchasers of bonds was either actively or constructively fraudulent.

In *Foster v. Seymour* (C. C.) 23 Fed. 65, 23 Blatchf. 107, Judge Wallace, upon a demurrer to a bill, had occasion to consider a claim made by a stockholder against a corporation and its trustees to require the latter to account to the corporation for a disposition of its capital stock alleged to have been fraudulent. The allegations of the bill presented a state of facts quite similar to those established by the evidence herein, so far as the issue of capital stock and its sale to the public operated as a fraud upon the public and future purchasers of the stock. He says:

"The transaction, as alleged, was a fraud upon the public. It was equivalent to an overissue of stock by a corporation to its stockholders. It was calculated to lead parties dealing with the corporation in ignorance of the facts to believe that it had a paid-up capital stock of \$10,000,000, and representing a corporate fund of that amount invested in mining property. By putting out the scrip, the trustees represented to the public, who have no means of knowing of the private contracts made between a corporation and its stockholders, that the capital stock had been subscribed for and paid in. It was not a fraud upon the stockholders, however, because there were none; nor necessarily upon persons subsequently becoming stockholders, because the stock was full-paid stock, and not liable to any further calls in the hands of those who might purchase it. *Scovill v. Thayer*, 105 U. S. 143 [26 L. Ed. 968]. A purchaser of the stock would not be injured by the transaction unless he paid more for it than it was worth; and every purchaser would stand upon the particular circumstances of his purchase. If the original transaction, in connection with the special facts of a purchase of stock, should operate as a fraud upon a purchaser, the cause of action would be his, and not that of the corporation. The fraudulent character of the transaction was imparted to it by the corporation itself; that is, by those who represented all there was of the corporation. The remedy of the complainant, if he has been deceived into the purchase of stock by false representations as to its value, is against those who have misled him. Even if he could recover against the corporation or against the trustees (see *Fosdick v. Sturges* [Fed. Cas. No. 4,956] 1 Biss. 255), the corporation has no cause of action against the trustees."

See, also, *Flagler Engraving Machine Co. v. Flagler* (C. C.) 19 Fed. 468, 470.

We have thus fully discussed the point because the brief of complainant's counsel asserts that, even if the stock had had some value, "the transaction would nevertheless have been a fraud upon the prospective bondholders and stockholders whom they were inducing to enter the company," and further contends that the prospective bondholders and purchasers were led by resolutions, representations, and reports of the officers of the company to believe that the money which they were about to pay for the bonds and stock would, after payment of the debts, be devoted to the interests of the company and the improvement of the plant.

In stating these conclusions we do not wish to be understood as holding that the transactions complained of may not have been grossly fraudulent, to the prejudice of certain creditors of the corporation; nor do we question the doctrine that the assets of an insolvent corporation are impressed with a trust for the payment of its debts, and can-

not be withdrawn by the stockholders without providing for such debts, as held by the court below. Assuming the facts found by the court below, we think the receiver has misconceived his right, and acted beyond the scope of his authority in thus bringing this suit in the name of the corporation.

The bill further alleges that the defendant Harris "permitted and directed him [Carlisle] to pay dividends on all of the shares of stock in said company, except those standing in the names of said John Carlisle and George W. Carlisle, his brother, and accordingly such dividends were paid by said John Carlisle to sundry persons, but the names of said persons and the amount paid to each of them are to your orator unknown." The claim that the estate of B. D. Harris is liable therefor appears to have been abandoned in the court below. The admission and contention of the receiver in this court is stated in his brief as follows: "For the amount that B. D. Harris actually received, his estate should be made to account. For what he paid others the action has probably abated." The bill does not charge that Carlisle paid any dividends to Harris between 1889 and 1892. It is admitted that no dividends were received by Harris after January 1, 1891. Even if dividends were received by him between 1889 and 1891—a question as to which the evidence is indefinite—such dividends were paid at a time when the company was a going concern, and without any open present evidence of insolvency. Furthermore it is not alleged nor shown that Harris knew that such dividends, if paid, were not paid out of the earnings of said corporation, or that he did not receive them in perfect good faith. The date of insolvency alleged in the bill was 1892, and it appears that in 1889 all outstanding debts had been paid. In these circumstances the estate of B. D. Harris is not liable in this suit by the corporation. *McDonald v. Williams*, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022; *New Hampshire Savings Bank v. Richie*, 121 Fed. 956, 58 C. C. A. 294.

The decree of the Circuit Court that the complainant is entitled to the sum of \$15,000 is reversed, with costs, and the cause remanded to said court, with instructions to dismiss the bill with costs.

(128 Fed. 332.)

L. BUCKI & SON LUMBER CO. et al. v. ATLANTIC LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1904.)

No. 1,315.

1. ABATEMENT—WAIVER OF GROUNDS—DELAY IN FILING PLEA.

Where a corporation plaintiff was dissolved before the action was tried, the defendant cannot proceed to trial, and, after waiting until a judgment in its favor has been reversed on a writ of error and the cause remanded for a new trial, file a plea setting up such dissolution in abatement.

2. SAME—DISSOLUTION OF CORPORATION PLAINTIFF—NEW JERSEY STATUTE.

Under the corporation laws of New Jersey (P. L. 1896, p. 295, § 53), which provide that corporations after their dissolution shall be continued bodies

¶ 2. Dissolution of foreign corporations, see note to *Republican Mountain Silver Mines v. Brown*, 7 C. C. A. 421.

See *Abatement and Revival*, vol. 1, Cent. Dig. §§ 194, 196, 197; *Corporations*, vol. 12, Cent. Dig. §§ 2454, 2589.

corporate for the purpose of prosecuting and defending suits by or against them, the dissolution of a corporation does not abate an action brought by such corporation in Florida to recover damages to its estate, business, and credit by reason of an alleged wrongful attachment of its property; the cause of action being one which survives under the laws of Florida.

3. EXECUTION—GROUNDS FOR STAY.

A judgment defendant is not entitled to a stay of execution on the ground that an unsatisfied judgment previously obtained by it against the plaintiff, but which it assigned to a third party, may in a certain contingency be reassigned so as to enable defendant to set it off against the present judgment.

4. JUDGMENTS—RIGHT OF SET-OFF—EFFECT OF ASSIGNMENT OF DEMAND BEFORE JUDGMENT.

The assignment of a demand in suit by the plaintiff to his attorney, who has a statutory lien thereon, prevents the accruing of any right to the defendant to set-off, against a judgment subsequently rendered thereon, a judgment previously recovered against the plaintiff.

5. MANDAMUS—ENFORCING OBEDIENCE TO MANDATE—SCOPE OF RELIEF.

A judgment for defendant in a Circuit Court was reversed on a writ of error, and the cause remanded with directions to award a new trial and to issue execution against the defendant for the costs of the appellate court. The Circuit Court, without sufficient cause, granted a stay of execution, and also erroneously sustained a plea in the nature of a plea in abatement filed by defendant, but without entering any final order or judgment in the case from which a writ of error would lie. Plaintiff applied to the Circuit Court of Appeals for a writ of mandamus to compel the Circuit Court to set aside the staying order and to proceed with the new trial. *Held* that, the remedy by mandamus being undoubtedly appropriate to enforce obedience to the court's mandate for execution, and the court having the full record before it relating to the ruling on the plea, it would treat the proceeding as in effect one on a writ of error, and deal with the whole case, instead of compelling the plaintiff to await the future action of the Circuit, and to again bring up the same record by writ of error.

Petition for a Writ of Mandamus to the Circuit Court of the United States for the Southern District of Florida.

The proceedings in this case were commenced by the following petition:

"Your petitioners, L. Bucki & Son Lumber Company and Horatio Bisbee, respectfully allege that in action at law brought in the Circuit Court of the United States for the Southern District of Florida, wherein said L. Bucki & Son Lumber Company was the plaintiff, and the Atlantic Lumber Company, Arthur Meigs, Daniel G. Ambler, and Richard H. Liggett were the defendants, such proceedings were had that on the 16th day of January, A. D. 1902, a final judgment therein was rendered in and by the said court for the said defendants. That thereupon the said plaintiff sued out from the United States Circuit Court of Appeals for the Fifth Circuit, and prosecuted, a writ of error to reverse the said judgment, and such proceedings were had upon the said writ of error that afterwards, to wit, on the 10th day of March, A. D. 1903, the said United States Circuit Court of Appeals rendered its judgment, whereby the said judgment of the Circuit Court was reversed. And the said Circuit Court of Appeals, by its mandate duly issued in the said action, ordered and commanded the said Circuit Court to enter up in the said court a judgment for costs on the said writ of error against the said defendants, and to issue an execution for which costs, to which mandate reference is here made. Your petitioners allege that, in obedience to said mandate, the said Circuit Court did enter a judgment against the defendants in the said court for the said costs, to the amount of fourteen hundred and twenty-four and $\frac{24}{100}$ dollars (\$1,424.24), as appears from the records of said court, and that afterwards, to wit, on the 23d day of April, A. D. 1903, execution in due form was issued out of the said court upon the said judgment against the said defendants for the said sum of \$1,424.24, and that the said execution was duly delivered to the United States marshal, who duly levied the same upon the lands and tenements of the said defendant

Richard H. Liggett, for the purpose of obeying the commands to him in the said execution contained, and of collecting the amount of the said judgment for the said costs. And your petitioners aver that afterwards, to wit, on the ——— day of June, A. D. 1903, the said Circuit Court, on the application of the said defendants, without any legal excuse or judicial power, ordered an indefinite stay of the said execution, and the said marshal, John F. Horr, not to further execute the said execution until the further order of the said Circuit Court, and that no further order has ever been made. And your petitioners allege that the said Horatio Bisbee was the attorney for the plaintiff in the said action, and prosecuted for the said plaintiff the said action and the said writ of error, and that the amount of the fees earned by the said attorney for his services in the premises greatly exceed the amount of the said judgment, and that the necessary costs and disbursements actually made by the said attorney in the said action, and which were paid by the said attorney out of his own pocket and from his own moneys, greatly exceed the amount of said judgment. And that the said fees, costs, and disbursements are, under the laws of the state of Florida, a lien upon the said judgment, superior to all other liens and all other rights. Your petitioners allege that the said Circuit Court has refused and still refuses to obey the commands of the said mandate in the said action. And your petitioners further allege that the said mandate commanded the said Circuit Court to grant a new trial in the said action, and thereafter to proceed according to law, and in accordance with the views and opinions of the said United States Circuit Court of Appeals; and the said Circuit Court, in obedience to the said mandate, did enter an order in the said action granting a new trial therein. But your petitioners aver that afterwards, to wit, on the ——— day of June, A. D. 1903, the said court, against the objection of the said plaintiff, duly made by its counsel in open court, did grant leave to the said defendants to file, and the said defendants did file, in pursuance of such leave, in the month of June aforesaid, a certain document which defendants soon after amended, and which, as amended, was intended as a plea in abatement of the further prosecution of the said action, and is in the words and figures as follows, to wit:

“In the United States Circuit Court, Southern District of Florida.

“L. Buckl & Son Lumber Company v. The Atlantic Lumber Company,
Richard H. Liggett, Daniel G. Ambler, and Arthur Meigs.

“Now come the defendants herein, by their attorney, and for the purpose of meeting the ground of demurrer to their plea filed herein on the ——— day of June, 1903, amend said plea so as to read as follows: That the L. Buckl & Son Lumber Company, plaintiff herein, was duly incorporated under the laws of the state of New Jersey on the first day of October, 1892, with an authorized capital stock of \$250,000, and that thereafter, prior to January 1, 1897, it issued the full amount of its capital stock of \$250,000. And a copy of the charter of said company is herewith filed and made part hereof. That the L. Buckl & Son Lumber Company was organized for the purpose of manufacturing and dealing in lumber, and that over fifty per cent. of its capital stock was invested in a sawmill plant situated at Jacksonville, Florida, and continued so to be from January 1, 1894, to January 1, 1898, and that no appreciable part of its property was at any time physically located in the state of New Jersey during the year of 1897. That on June 7, 1897, the State Board of Assessors for the state of New Jersey certified and reported to the Comptroller of the State of New Jersey that the amount of the capital stock of the said L. Buckl & Son Lumber Company was \$250,000, and that the tax due thereon was the sum of \$250.00; and that thereupon there became due to the state of New Jersey from the said L. Buckl & Son Lumber Company the said sum of \$250 for the taxes of 1897; that said tax has never been paid; and that on May 2, 1900, the Comptroller of the State of New Jersey reported the fact of the nonpayment of said tax to the Governor of the State of New Jersey, who did thereupon, on the said 2d day of May, 1900, and since the last pleading in this action, issue a proclamation declaring the charter of said L. Buckl & Son Lumber Company void, a copy of which proclamation is herewith filed, and is prayed to be read and taken as part of this plea; that said proclamation was duly filed in the office of the Secretary of State for the

state of New Jersey, and that said proclamation was duly published for one week in the newspapers specified in said proclamation, as provided for therein.

"R. H. Liggett, Defendants' Attorney."

"And the said document was verified. Your petitioners aver that afterwards, in the month of June aforesaid, the said plaintiff filed in the said action a demurrer and motion to the aforesaid document, in the words and figures following, to wit:

"In the Circuit Court of the United States, Southern District of Florida.

"L. Bucki & Son Lumber Company, Plaintiff, v. The Atlantic Lumber Company, Richard H. Liggett and others, Defendants.

"Comes now the plaintiff by its attorneys, Bisbee & Bedell, and demurs to the amended plea of defendants, intended as a plea in abatement, upon the following grounds: First. That the plea states no fact constituting a ground for a dismissal of said suit. Second. That, under the statutes of New Jersey, the plaintiff corporation continued in existence for the purpose of prosecuting and defending suits, and winding up its business and affairs, even though the proclamation of the Governor was effective to dissolve the plaintiff corporation. And no other grounds appearing on the face of said amended plea.

"I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

[Signed] H. Bisbee."

"Motion.

"Now comes the plaintiff in the above-entitled action, and moves the court to strike the amended plea, intended as a plea in abatement in above action, on the following ground: That the court has no authority to allow the said plea to be filed, and on the ground that the defendants, long after they knew of the said proclamation of the Governor, voluntarily submitted themselves to the jurisdiction of the United States Court of Appeals, and submitted the merits of the said action to the said court, and thereby the said defendants are estopped and have waived their right to interpose the said plea in abatement."

"That the said demurrer was duly verified, and the same and the said motion were duly signed by the plaintiff's attorney; and soon thereafter, to wit, 'in the month of June aforesaid, the said court, by its orders of record, denied the said motion and overruled the said demurrer; and your petitioner avers that the said court has not made and entered any formal judgment dismissing the said action, which must necessarily follow from the said orders made and entered as aforesaid.' Your petitioner avers that the said proceedings of the said officers of the state of New Jersey in the aforesaid document filed by the defendants, stated and intended as a bar to the prosecution of this action, were all had and were all performed, as shown therein and by the record of this action, and about twenty months prior to the trial of the said action in the said Circuit Court, and nearly three years prior to the trial and judgment in said action in the said United States Circuit Court of Appeals; and your petitioner avers that the said defendants were and are chargeable with a knowledge of the said proceedings by the said officers of the state of New Jersey, and that a petition was filed in the said action by the defendants on May 23, A. D. 1903, for the purpose of obtaining a stay of the said execution which contains the following averment, to wit: 'That your petitioner the Atlantic Lumber Company was wholly ignorant of the dissolution of the L. Bucki & Son Lumber Company until the — day of —, 1902, and your petitioners Daniel G. Ambles and Richard H. Liggett were wholly ignorant of the dissolution of the said L. Bucki & Son Lumber Company until after October 1, 1902.' And your petitioner avers that, having the knowledge aforesaid, the said defendants were silent, and voluntarily submitted themselves to the jurisdiction of the said courts, and each of them, for a judgment upon the merits of the said action, after having said knowledge of the said proceedings of the said officers of the state of New Jersey, and said defendants were and are estopped from setting up the said proceedings as a bar to the further prosecution of the said suit. And your petitioners aver that on or before the 26th day of July, A. D. 1898, the plaintiff, for value received, duly assigned by contract in writing all its claims in suit in the said

action against all and each of the said defendants to the said Horatio Bisbee to secure the payment to the latter for his professional services before the date aforesaid rendered, and thereafter to be rendered, in the said and other actions for and against the said plaintiff, and the said assignment expressly provided that the said assignee should have the right to prosecute the said action against the said defendants, and collect the proceeds thereof, which said assignment, and its nature and character, as herein alleged, was duly set up in the said action by a replication to the said document intended as a plea in abatement by defendants in said action, and said replication was demurred to, and said demurrer sustained by the said Circuit Court. And your petitioners, in support of their petition, refer to the printed transcript of the record of said action, and to copies thereof on file in the said Court of Appeals, and pray the said court to refer to the same as often as may be necessary. And your petitioner avers that the aforesaid orders of the said Circuit Court, made and entered in the said action as aforesaid, are in violation of the legal rights of the plaintiff under the said mandate, and that it has no adequate legal remedy, except by a writ of mandamus. Wherefore your petitioner prays for a writ of mandamus from this honorable court, directed to the said Circuit Court, and to the judges thereof, commanding them to vacate the aforesaid order staying the said execution for costs, and commanding them to strike from the files of the said action the aforesaid document filed by the defendants in the month of June, A. D. 1903, setting up the said proceedings of the said officers of the state of New Jersey, stated in the said document, and commanding them to proceed to execute the said mandate in the said action, and to grant such other and different relief as petitioners are entitled to. And your petitioner will ever pray," etc.

An alternative writ having been ordered, the judge of the Circuit Court made return as follows:

"To their Honors the Judges of the Circuit Court of Appeals for the Fifth Circuit of the United States, James W. Locke, Judge, shows cause against the issuance of a writ of mandamus herein as follows:

"(1) That on March 10, 1903, your honors entered a judgment herein reversing the judgment of the Circuit Court, and held and decided that certain evidence introduced at a former trial of the action at law tended to sustain the allegations of the declarations that the writs of attachment therein described had been sued out by the defendants therein maliciously and without probable cause, and your honors did reverse the finding of the Circuit Court on that point, and at the same time your honors did review and revise certain decisions of the Circuit Court made in connection with the admission and rejection of evidence in said action. That your honors remitted the cause to the Circuit Court, with instructions to give a new trial and to proceed according to law and the opinion of your honorable court, duly rendered and filed in said cause. That your honors did not render a final judgment on said action, or give any judgment in said cause to which this respondent could refer for guidance, other than those referred to, which would have required this respondent, in another trial of the action, to conform the rulings of the Circuit Court to the decisions rendered by your honorable court. That the respondent has duly entered an order granting a new trial of the action. That on June 18, 1903, the defendants in the action presented to the Circuit Court the following plea, and applied for leave to file the same, to wit: 'Now come the defendants, the Atlantic Lumber Company, Daniel G. Ambler, Arthur Melgs, and Richard H. Liggett, by their attorney, and, for a plea to the declaration herein, say that after the last pleading herein, to wit, on the 2d day of May, 1900, the L. Buckl & Son Lumber Company, plaintiff herein, was dissolved, and its charter became null and void, as will appear from the proclamation of the Governor of the State of New Jersey, a copy of which is hereto attached and made a part of this plea.' Which plea was duly signed and verified according to the practice and statutes of Florida, and a copy of the proclamation referred to is hereto attached, marked 'Exhibit A,' and is to be read as part of said plea. In the opinion of respondent, the plea alleged facts which, if true, presented a substantial defense to the action: and respondent, in the exercise of the discretionary powers vested in the judge

of the Circuit Court, gave leave to the defendants to file said plea, and caused an order to be entered accordingly. That on the same day the plaintiff filed the following demurrer to said plea: 'Comes now the plaintiff, by Bisbee & Bedell, its attorneys, and demurs to the plea of defendants' abatement, filed by leave of court on June 18, 1903, upon the following grounds: First. It states no facts establishing that the plaintiff has not, in law or in fact, a legal existence; second, that, under the laws of New Jersey, the plaintiff did have, at the date of the plea, and has now, a legal existence, and is competent to prosecute the said action; third, that, as shown by the alleged proclamation of the Governor of New Jersey, it was issued without giving any notice to the plaintiff, and is null and void.' That said demurrer was duly certified to by counsel, and duly verified. That on June 20, 1903, the plaintiff filed the following replication to the said plea: 'That all the claims and demands embraced in suit in said action, and declared on therein, heretofore, to wit, on the 26th day of July, 1898, were, for value received, duly assigned and transferred by the plaintiff to Horatio Bisbee, which said assignment was in writing, and is made part hereof, and is in the words and figures following, to wit: [A copy of said assignment is attached hereto, marked 'Exhibit B,' and is to be read as part hereof.] And the plaintiff says that at the time of such assignment the plaintiff was indebted to Horatio Bisbee, the said assignee, in a sum of money exceeding \$15,000 for professional services before then rendered, and retainers then due and unpaid, and that at the date of the said plea in abatement the plaintiff was indebted to the said Horatio Bisbee for professional services, covered and intended to be secured by the said assignment, in a sum exceeding \$35,000, which said several sums of money at the time aforesaid remained, and still remain, unpaid. That afterwards, on June 24, 1903, the defendants filed the amended plea recited on pages 4 and 5 of the petition, and on the same day the plaintiff filed the demurrer and motion recited on pages 6 and 7 of the petition. That on June 24, 1903, the defendants filed a demurrer to the said replication, setting up an assignment of the cause of action to H. Bisbee, Esq., on the grounds following: 'First, because it avers no facts that constitute a good and sufficient reply to the said plea to which it is pleaded; second, because said assignment mentioned in said replication is null and void; third, because the said cause of action determined and terminated upon the dissolution of the L. Bucki & Son Lumber Company.' That the demurrer to the amended plea, the motion to strike said plea, and the demurrer to the second replication afterwards came on to be heard before the Circuit Court, and were elaborately argued by counsel. The regularity of the taxation proceedings in the state of New Jersey were not contested by the replications thereto, but it was insisted by counsel for plaintiff that the plaintiff corporation could not have been legally dissolved, save through the judgment of a court of competent jurisdiction in a judicial proceeding instituted for that purpose, and that the provisions contained in the law of New Jersey under which it was claimed the plaintiff corporation had been dissolved did not constitute due process of law, and that, assuming the corporation to have been legally dissolved, the action might still be maintained by the corporation by virtue of sections 53, 54, 55, and 56 of chapter 185, Laws of the State of New Jersey, approved April 21, 1896, or else said action might be maintained in the name of the corporation by virtue of the assignment of the cause of action to H. Bisbee, Esq., set up in the second replication to the plea. Upon an inspection of the laws of New Jersey, it appeared to this respondent that this charter was granted subject to the right of amendment, alteration, and repeal at the pleasure of the state, and that an express statute in force at the time of the allowance of the charter provided that, upon the failure of a corporation for two consecutive years to pay any tax which should be assessed against it under any law of the state, the charter should be void, and all powers conferred by law upon such corporation were thereby declared inoperative and void, etc.; and it further appearing that said statute was re-enacted, in substance, on April 21, 1896, and has been in force from March, 1891, to this time, this respondent became convinced that the occurrence of the facts stated in the plea had dissolved the plaintiff corporation. From examination of sections 53, 54, 55, and 56 of chapter 185, Act of April 21, 1896, this respondent came to the conclusion that such act

was designed to furnish a convenient means of administering the assets of a dissolved corporation, and that the assets contemplated by the statute were of the same character as a court of equity habitually preserves to the creditors and stockholders of a dissolved corporation, or such as pass to an assignee in bankruptcy or insolvency, or to a receiver, or such as survive to the personal representative of a deceased person, and that while the statutory trustees of a dissolved corporation might sue and be sued in the name thereof, or in their own names, such suits were expressly confined to property rights, and to rights arising out of contract, expressed or implied. Being of the opinion, on the whole, that, upon the admitted facts, the corporation had been dissolved, and that the cause of action sued on had been extinguished thereby, this respondent gave judgment accordingly, and entered an order overruling the demurrer to the plea; and further being of the opinion that the defense had been seasonably presented, and that all the questions involved in said plea had been left open by the mandate of your honors, this respondent also overruled the motion to strike the said plea from the record. Upon consideration of the demurrer to the replication setting up an assignment of the cause of action, the respondent was of the opinion that this cause of action was not assignable, and also that an assignee could not, after the dissolution of a corporation, continue to maintain in its name a suit on a cause of action which did not pass to its statutory trustees, and which they could not have maintained an action upon, and this respondent gave judgment in accordance with this view, and entered an order sustaining the demurrer to the replication setting up the assignment of the cause of action. That, at the time of entering the orders mentioned, the Circuit Court gave the plaintiff leave to file additional pleadings as it might be advised, and that subsequently, on the 25th day of July, 1903, the plaintiff filed two replications to said plea, and that the defendants demurred to one of said replications, and moved to strike the other, and that said demurrer and motion were submitted by the parties to the Circuit Court for decision on or about December 6, 1903, and that action thereon has been delayed pending the decision by your honors of the petition for mandamus.

"(2) This respondent further shows unto your honors that on April 22, 1903, an execution issued out of the Circuit Court, on the mandate of the Circuit Court of Appeals, for the costs of prosecuting the writ of error in this action, and was delivered to the marshal to be levied. That on June 22, 1903, the defendants filed a petition in the Circuit Court praying that an order might be entered staying the enforcement of said execution, a copy of which petition is hereunto attached, marked exhibit 'C' and it is prayed that the same may be taken and read as part of this return; that, upon consideration of the said petition, this respondent was of the opinion that such a state of circumstances existed as entitled the defendants to a temporary stay of execution, and that irreparable injury might be suffered by the defendants from the collection of the execution, while plaintiff's rights could be fully protected by the execution of security, and that the respondent accordingly entered an order on June 27, 1903, staying the enforcement of the execution until the first day of the next term of the court (December term, 1903), upon condition that the Atlantic Lumber Company gave bond in the sum of \$2,000 to abide the final order of the court, and that the respondent embodied his reasons for granting that order therein, a copy of which is hereunto attached as Exhibit D, and it is prayed that the same may be read as part hereof.

"The above narrative recites the circumstances under which the orders complained of were entered, and this respondent's reasons for making said orders, and respondent submits the same to your honors for your consideration, and judgment whether or not a writ of mandamus should issue. And now, having fully answered, this respondent prays to be hence dismissed."

To the return petitioners demur and reply as follows:

"Come now the said petitioners, by Bisbee & Bedell, their attorneys, and demur to the several parts of the respondent's return to the rule to show cause, hereinafter stated, upon the following grounds:

"First. Said return admits the truth of every material fact stated in the petition, and alleges no material facts in the first five pages thereof sufficient to defeat the petitioners' right to a mandamus to compel a new trial.

"Second. So much of said return as attempts to state what this court decided on a writ of error is immaterial, because this court knows best what it decided.

"Third. So much of said return as sets up certain proceedings by the officers of the state of New Jersey under certain statutes thereof, even though they were effective to dissolve the corporation petitioner, constitute no reason for abating the suit: (a) Because the statutes of said state specified in the said return expressly continued the existence of the corporation for all purposes of prosecuting and defending all suits by or against it; (b) and because, under those statutes, it was the duty of the said corporation 'to sue for and recover' all debts and property thereof (sections 53, 54, and 55), and the claims and choses in action declared on in the said action are the property of said company; (c) and because the question of what choses in action survive the death of a natural person has no application in the case; (d) because the claim for damages to property, business, and credit of the corporation declared on in the action was assignable under the laws of Florida, where said assignment was executed.

"Fourth. The said respondent had no power or jurisdiction to allow the said plea in abatement to be filed.

"And petitioners demur to so much of said return as is contained in the sixth page thereof, stating respondent's reasons for staying the execution of this court, upon the following grounds:

"First. The said respondent had no power or jurisdiction to entertain said petition for such stay, nor to stay said execution.

"Second. Upon the facts averred in the said petition, and especially the facts showing an attorney's lien on the judgment of this court, upon which the execution issued for all the costs and disbursements which were paid by the said attorney, for which said judgment was rendered, and for his services in said action, defeats and precludes, both in law and equity, any right of set-off set up in return, in Exhibits C and D thereof.

"Third. Because the said assignment, not denied by any pleading in the said action, nor by the said return, which assignment was made over eighteen months before judgment versus the Fidelity & Deposit Company on the claims so assigned was in part recovered, and four years before the alleged assignment by the Atlantic Lumber Company to the said Fidelity Company of the alleged judgment versus the Bucki Company, defeats any such set-off, and no consideration was paid for the said assignment.

"Fourth. Because the said respondent utterly ignored the rights of the said attorney and the said assignee, whereas it was his duty to protect them.

"Fifth. Because the torts and unlawful acts of the Atlantic Lumber Company in improperly suing out the said attachments caused the very damage to and the diminution of the estate of the Bucki Company for which said judgment versus the Fidelity Company was recovered, and neither the said Atlantic Lumber Company, nor its said assignee, have any standing in law or equity to take those damages, to pay, by way of set-off or otherwise, the said judgment of this court versus the Atlantic Lumber Company, to the exclusion of the attorney and creditor of the Bucki Company whose services and disbursements obtained the said judgment.

"Sixth. Because the Atlantic Lumber Company cannot take advantage of its own torts and unlawful acts, or raise any equity thereon for a set-off, even against the said Bucki Company.

"Seventh. Because the Atlantic Lumber Company never executed the said attachment bonds, and was not an obligor thereon, and the relation of principal and surety upon the bonds between the said company and the said Fidelity Company never existed, as will appear from the inspection thereof in the records of the said action in his court.

"Eighth. And for other reasons appearing from the face of the said return of respondent.

"And these petitioners, replying to so much of the said return, on page 5 thereof, as sets up two replications to the said plea in abatement not disposed of by the said Circuit Court, say that there were three replications, and that they raised the same questions of law in another form of pleading, which had previously been decided adversely to the plaintiff; that demurrers

were filed to two of the said replications, and a motion to strike the other was filed, and that, since the said respondent's return was served upon your petitioners, the said respondent has sustained the said demurrer and the said motion; and that thereby all pleadings to the said plea in abatement have been disposed adversely to petitioners. And your petitioners aver that stay of execution on the judgment versus the Buckl Company, referred to on page 13 of the respondent's return, was ordered in July, 1898, about eighteen months before the recovery of the judgment versus the Fidelity Company, and consequently the statement in said return, on page 18 thereof, that 'the enforcement of such execution has now been stayed for upwards of six years because the L. Buckl & Son Lumber Company did recover a judgment against the Fidelity & Deposit Company of Maryland as surety on the bond of the Atlantic Lumber Company,' is obviously incorrect. Said stay of execution was made on the ground that the Buckl Company had pending against the Atlantic Company sundry suits, claiming large damages."

Horatio Bisbee and Geo. C. Bedell, for petitioners.

R. H. Liggett, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. Conceding the regularity and validity of the proceedings in the state of New Jersey under Pub. Laws April 21, 1896, c. 187 (P. L. 1896, p. 319), as set forth in the quasi plea in abatement, still we think said plea comes too late, and is bad in substance. It is not a plea to the merits, but sets up facts which were in existence long before the trial of the action on the merits in the Circuit Court. The Atlantic Lumber Company was charged with knowledge of such facts, and admits actual knowledge before hearing on error in this court. To allow the plea now is to put the Atlantic Lumber Company in the attitude of successfully experimenting with the court.

Section 53 of the Pamphlet Laws of New Jersey of 1896 (P. L. p. 295) is as follows:

"All corporations, whether they expire by their own limitation or be annulled by the Legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

The word "suits" is a very comprehensive term, and includes all actions at law, ex contractu and ex delicto, and all actions in equity. See *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Bouv. Law Dict.* verbo "Suits." This section 53, therefore, in terms, fully provides for the continuation of suits by or against the dissolved corporation, notwithstanding the dissolution, and such is the construction of the New Jersey courts. *Grey v. Newark Plankroad Co.*, 65 N. J. Law, 603, 48 Atl. 557. See *American Surety Company v. Great White Spirit Company*, 58 N. J. Eq. 526, 43 Atl. 579. The same construction has been given in the Fourth Circuit in *Boyd v. Hankinson et al.*, 92 Fed. 49, 34 C. C. A. 197.

The sections succeeding section 53, Pamphlet Laws aforesaid—54 to 60—do not, in our opinion, in any wise limit the scope of section 53, but, in line therewith, relate to proceedings to be had in the matter of winding up dissolved corporations.

It is suggested that, as the New Jersey proceedings dissolved the corporation, the present suit must abate, notwithstanding section 53, because it is a personal action for malicious prosecution, and therefore cannot survive dissolution. The first answer to this is that the New Jersey proceedings did not dissolve the corporation, quoad the prosecution of suits, and that statute is controlling in the matter. See sections 53, 59, New Jersey Laws, *supra*. The second answer is that this suit is not one of those actions for personal injuries which, under section 989 of the Revised Statutes of Florida, of 1892, die with the person. While, in a general way, it would be called an action for malicious prosecution, it is really an action to recover damages for trespass upon property; or, as otherwise stated, it is an action to recover damages to the estate, business, and credit of the Bucki & Son Lumber Company. The distinction is recognized by the Supreme Court of Florida in *Jacksonville St. Ry. Co. v. Chappell*, 22 Fla. 616, 1 South. 10, and we think sound reason requires the holding that where the damages from a tort are to the estate of the plaintiff, as distinguished from damages to the person, the right of action survives. For authorities on the subject, see 25 Ency. Pl. & Pr. p. 328.

The order of the Circuit Court staying the execution issued under the judgment of this court for costs appears to be based upon the following state of facts: The Atlantic Lumber Company had recovered a judgment in the Circuit Court, afterwards affirmed by this court, against the Bucki & Son Lumber Company. Subsequently the Bucki & Son Lumber Company obtained a judgment in the Circuit Court, rendered on mandate from this court, against the Fidelity & Deposit Company of Maryland, growing out of matters wherein the Fidelity Company was a surety for the Atlantic Lumber Company. Thereupon the Atlantic Lumber Company assigned its judgment against the Bucki & Son Lumber Company to the Fidelity Company to be used as a partial set-off, and proceedings to compel such set-off were instituted, and are still pending. Now the Atlantic Lumber Company claims that the execution issued against itself under the mandate of this court in the instant case, and in favor of the Bucki & Son Lumber Company, should be stayed to await the event—the success or failure of the Fidelity Company to obtain the set-off above referred to—with the view that, if the Fidelity Company fails to establish its right to set off the judgment in favor of the Atlantic Lumber Company and against the Bucki & Son Lumber Company against the judgment in favor of the Bucki & Son Lumber Company against itself, then a reassignment of the judgment obtained by the Atlantic Lumber Company against the Bucki & Son Lumber Company will enable the Atlantic Lumber Company to plead the same as a set-off against the judgment and execution for costs rendered under our mandate in the instant case. On this state of facts, it seems that the order staying the execution was improvident. The Fidelity Company is no party to the present suit, the Atlantic Lumber Company owns no judgment against the Bucki & Son Lumber Company, and is not entitled to have execution against itself stayed to await a possibility that it may some time have a judgment which it may be able to plead as a set-off.

This seems to dispose of the order staying execution, but there is a further answer: Prior to the obtaining of judgment in the instant case against the Atlantic Lumber Company, the Bucki & Son Lumber Company had assigned the cause of action to petitioner H. Bisbee, who, at the time judgment was rendered, was the owner of the same. It seems to be reasonably well settled that "an assignment of a demand before the entry of judgment upon it gives to the assignee a superior equity to that of a party claiming a right to set off a judgment previously recovered against the assignor, and prevents the right of set-off from accruing, since there can be no right of set-off under judgments until both exist." 25 Ency. Law, p. 618, note 5. We do not think that the Atlantic Lumber Company is in any position to question the assignment to Bisbee. It appears to have been in consideration of professional services rendered and to be rendered, and for moneys, costs, and expenses of litigation advanced. Outside of the assignment, Bisbee, as attorney recovering the judgment, has a lien on the same, not to be divested by any set-off of judgment recovered on prior independent transaction. *Carter v. Bennett*, 6 Fla. 214, 258, 259; *Carter v. Davis*, 8 Fla. 183. See *In re Paschall*, 10 Wall. 483, 496, 19 L. Ed. 992; *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U. S. 117, 127, 5 Sup. Ct. 387, 28 L. Ed. 915.

From what we have said, it follows that in our opinion the quasi plea in abatement should not have been permitted filed, and, if filed, should have been promptly overruled, and that the order staying the execution for costs, as directed in our mandate, should not have been granted. It was granted without authority, and upon an insufficient case.

And that brings us to what we think is the real question, to wit, what, if any, relief can be granted petitioner in the present proceedings? There is no question that the rulings upon the plea and the order staying execution directly tended to hinder and delay, if not entirely defeat, the execution of our mandate. It may be admitted that, if the Circuit Court had finally ruled adversely to petitioner upon either the plea or the right to a stay of execution, the petitioner could have prosecuted a writ of error; and it may be that, if relief should be denied petitioner in the present proceedings, eventually a ruling will be had upon those questions in the Circuit Court, and from such ruling, if adverse, he can prosecute a writ of error. But the case shows that the Circuit Court has not finally ruled on either proposition, and that a ruling at any day certain is not to be expected; and to compel petitioner to await such indefinite ruling, and then possibly be driven to a writ of error, will cause irreparable injury to petitioner. In regard to the ruling staying the execution issued under the mandate of this court, we think that, in accordance with the undisputed authorities, a mandamus may issue, and that being the case, and as the full record of the proceedings upon the alleged plea are now before us, and nothing but delay and injury can result from driving petitioner to await a ruling thereon and then sue out a writ of error, we are disposed to deal with the case on the whole record as though properly before us upon a writ of error. We think such ruling is supported by sound reason. To deny relief at this time, with the full record before us, with a view that

some time in the hereafter the petitioner may bring again before us on writ of error, is to stickle for forms rather than merit and substance. This long drawn out litigation will never have an end if we ignore adjudicated rights and encourage the continued wrestling with technicalities. The case of *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432, recognizes the right of the appellate court to deal with obstructions to its mandate by mandamus, and we consider it decidedly in point.

A mandamus will issue as prayed for.

(128 Fed. 343.)

L. BUCKI & SON LUMBER CO. V. ATLANTIC LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904.)

No. 1,298.

1. JUDGMENT—RELIEF AGAINST IN EQUITY—MISTAKE.

The undisputed evidence adduced in an action at law in support of a set-off claiming damages for breach of a contract for a sale of logs to defendant *held*, under the instructions of the court as to the measure of damages, to have established definitely and certainly the amount of the damages to which the defendant was entitled as a set-off, for the purpose of a subsequent suit in equity by such defendant to have the judgment corrected on the ground that a clerical mistake was made by the court in computing the amount of such set-off, in requiring a remittitur of the amount thereof from the judgment for plaintiff.

Shelby, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

H. Bisbee and George C. Bedell, for appellant.

R. H. Liggett, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The original transactions and the resulting controversies between the parties to this suit, and to which this suit is somewhat related, have been, in different phases, several times before this court, and our reported decisions may be found in 92 Fed. 864, 35 C. C. A. 59; 93 Fed. 765, 35 C. C. A. 590; 109 Fed. 411;¹ and 121 Fed. 233.² This case was before us on appeal at our November term, 1901, and our opinions disposing of the case on that appeal, announced May 20, 1902, are reported in 116 Fed. 1.³ The averments of the bill in this case are briefly, but sufficiently, set out in the opinion of this court on the former appeal. Therein it also appears that the appellee had submitted a demurrer, specifying grounds, the first of which was, "Because the said bill does not set up such facts as entitled the complainant to any relief in a court of equity against this defendant," and that on the hearing of the demurrer the Circuit Court "ordered that said demurrer be, and the same is hereby, sustained upon the ground alleged therein; and, it further appearing that the insufficiency of the bill is such that it cannot be cured by amendment, it is ordered that it

¹ 48 C. C. A. 455.

² 57 C. C. A. 469.

³ 53 C. C. A. 513.

be dismissed." This decree of the Circuit Court was reversed by this court, and the cause was remanded to that court, with direction to overrule the demurrer. It will be seen, with reference to our opinion announcing the result just stated, that it was to the effect that the facts averred in the bill entitled the plaintiff to the relief prayed for. Agreeably to the mandate of this court, the Circuit Court overruled the demurrer, and the defendant answered, and much proof was taken before an examiner, and the case came on for trial. The learned judge of the Circuit Court, in announcing his decision, discussed at some length the twenty-ninth article of the bill, but does not formulate his finding in reference to it in such way as favors quotation. After that discussion, he refers to the opinion of this court on the former appeal, and says:

"One important point in the decision of the Circuit Court of Appeals in overruling the demurrer herein seems to be based upon the allegation of the bill that the amount to which the defendant was entitled was unquestioned and conclusively proven. This was the only strongly contested point in the trial below, and the amount directed to be remitted was approximately the amount due under the measures of damages which had been determined by the trial court for the time for which the question had been withdrawn from the jury, and has since been sustained by the Court of Appeals, while the amount which the complainant herein demands was an amount which on every ruling of the court was refused and denied, and which in the entire litigation, so far as shown, was not proven. The court therefore finds that the allegations of the twenty-third and twenty-fourth articles of complainant's bill are not sustained, and the measures of damages found and determined in that suit has been fully adjudicated and determined upon appeal. It also finds that there was no undertaking of the court to change the measure of damages which had been given to the jury, but only to correct the error which possibly may have been committed in instructing the jury that payment and settlement between the parties for the logs up to the 15th of August, 1897, was final; that such order could in no way adjudicate any rights between the parties; and that no adjudication of the amount claimed in the bill was made."

After a full and very careful examination of all of the evidence brought up on this appeal, we find ourselves unable to concur in the findings of the Circuit Court as just above expressed. The twenty-third article of the bill charged that, on the trial at law to which the bill referred, the court, at the request of the defendant therein, instructed the jury that the difference between the contract price of the logs contracted to be delivered, and the market price of the logs actually delivered, was the legal measure and rule of damages to be allowed and awarded to the defendant in that action, on and under its pleas of set-off; and the court submitted to the jury at that trial the question of the amount of said damages and set-off to be allowed the defendant under the said pleas in respect to, and only in respect to, the logs delivered between the 14th day of August, 1897, and the 1st day of October. In the judgment minute, signed by the trial judge June 30, 1898, it is shown that the jury had been instructed that the payment and settlement had between the parties for the logs up to the 15th of August, 1897, was final; thus withdrawing from the jury all consideration of the pleas of set-off on account of the transactions had during the months of June, July, and the first half of August. And we think that the evidence which has come up to us on this appeal conclusively shows that, as to the pleas relating to the transactions between August 14th and

October 1st, the trial judge had, at the request of the defendant, instructed the jury as follows:

"Under the defendant's pleas of set-off in this case, you are instructed to allow the defendant, in making up your verdict, the difference in the value of the logs delivered in June, July, August, and September, on account of such logs being less in size than required by the contract, and the price of those contracted for; and you will determine this difference by deducting the market value in Jacksonville of logs of the sizes delivered in said months from the price of logs required by the contract; that is, logs $3\frac{1}{2}$ to the thousand. This will be the loss the defendant sustained for deficiency in size of logs, if the heart of the logs had not been injured by the worms."

It is not disputed, as we have already shown, that this instruction was restricted in its application to the pleas which covered the period between the 14th of August and the 1st of October. The judgment minute made in disposing of the motion for new trial, already alluded to, in addition to what has already been quoted in substance, recites further thus:

"Although it might appear that the size of the logs for that time was smaller than the average size guaranteed, and that, according to a custom of the market, the price of such logs in the market, on account of such smaller size, was \$583.07 less than the amount paid."

It is undisputed that the amount paid for this period was the contract price of the logs contracted to be delivered, and it is shown beyond dispute that, according to the custom of the market, the price of such logs as were in fact delivered was, on account of the smaller size referred to, not \$583.07 less than the amount which had actually been paid, but was \$3,422.10, without interest. Adding interest from the date when the payments were made, respectively, to the date of the verdict, which interest aggregates \$210, gives the amount of \$3,632.10, which the adjudication made as to the rights of the parties clearly required should have been deducted from the amount of the verdict, instead of the amount of \$583.07 mentioned by the judge. The remittitur actually made (\$613.37) shows that, in the judgment of the plaintiff in that action, the figures specified by the judge in the order signed by him were too small. It is not necessary for us to speculate as to the basis on which these calculations were made. In our opinion, the record clearly shows the true basis on which the calculation should have been made, and, if thus made, the difference as we have stated it is developed. It may appear to be large. That feature tends only and strongly to show the mistake on which the plaintiff in this suit bases his claim for relief. As we have suggested, the mistake is so considerable in its proportions as perhaps to render it inexplicable; but, from our observation of and experience with the litigation between these parties, the fact that such a mistake was made is not calculated to cast any reflection on the most experienced, enlightened, and upright judge.

As the law of the case was sufficiently discussed in our opinions rendered on the former appeal, and settled so far as it relates to this suit, and as all of the evidence is now before us, and the parties have been fully heard, orally and by printed briefs, there is no good reason why we should remand the case for further proceedings in the Circuit Court. The decree of the Circuit Court is reversed, and we here and now render the decree which the Circuit Court should have rendered, as follows:

It is now ordered, adjudged, and decreed that the judgment for \$8,988.-37 rendered in the Circuit Court May 7, 1898, in favor of the Atlantic Lumber Company against the L. Bucki & Son Lumber Company, be, and it is hereby, credited with the sum of \$3,632.10, as of the date of its rendition, so that the said judgment shall stand for, and be in the amount of, \$5,356.27, to enforce which execution shall issue in favor of the plaintiff in that judgment, and against the defendant therein. It is further ordered that the appellee herein pay all the costs in this suit incurred, in this court and in the Circuit Court, to enforce which execution may issue. Reversed and rendered.

SHELBY, Circuit Judge (dissenting). For reasons heretofore given (116 Fed. 8, 53 C. C. A. 513), I respectfully dissent from the judgment of this court in this case.

(128 Fed. 346.)

BROMBERGER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 25, 1904.)

No. 61.

1. POSTAL OFFENSES—LARCENY AND EMBEZZLEMENT FROM THE MAILS—INDICTMENT.

An indictment under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], contained two counts, the first charging that defendant did unlawfully and willfully secrete, embezzle, and destroy a certain letter intended to be conveyed by mail, which came into defendant's possession by virtue of his office and employment as a letter carrier, and which contained articles of value described, and the second charging that defendant did steal, take, and carry away such articles of value described therein. *Held*, that such counts were not repugnant to each other as charging both embezzlement and theft of the same article, the one being for the embezzlement of the letter and the other for stealing its valuable contents.

2. SAME.

A silver certificate issued by the United States is a "pecuniary obligation or security of the government," and "an article of value," within the meaning of Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], and the secreting or destroying of a letter containing such a certificate, and the taking of such certificate from the letter, by a mail carrier, constitute embezzlement and larceny under said section.

3. SAME—DESCRIPTION OF CONTENTS OF LETTER.

An indictment under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], charging a mail carrier with embezzlement of a letter containing an article of value, and with stealing such article, is sufficiently specific where it describes the letter and describes the article contained therein as a silver certificate of the United States, giving its denomination, without setting out specifically the marks and numbers thereon.

4. CRIMINAL LAW—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

On the trial of a mail carrier for embezzling a letter and stealing an inclosure there was evidence tending to show that two decoy letters, one of which was the one defendant was charged with taking, were by mistake placed in the pigeonhole of another carrier, who, when sorting his letters, said to defendant, "I have got two letters for your route, and I am going to misbox them," and added loud enough for defendant to hear, "These fellows must take me for Hanlon." *Held*, that the exclusion and striking out of evidence offered by defendant to show that Hanlon was a former carrier on defendant's route, who had been convicted through decoy letters addressed like the two intended for defendant, on the theory

that defendant, being so warned, would not have been likely to take either of such letters, was without prejudice, even conceding that evidence of such collateral character was admissible, there being sufficient in the previous testimony to advise the jury in a general way who Hanlon was.

5. POSTAL OFFENSES—EMBEZZLEMENT OF LETTERS—DECOY LETTERS.

A letter properly stamped, with the receiving stamp of the office thereon, and placed in a carrier's pigeonhole at a postal station with other letters, addressed to a real person on his route, is "intended to be conveyed by mail," and its abstraction by the carrier and the taking of money therefrom constitutes an offense under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], although it was placed there by a postal inspector for the purpose of testing the carrier's honesty.

6. CRIMINAL LAW—REFUSAL TO EXCLUDE WITNESS.

The refusal of the court to exclude a witness during the trial of a criminal case is discretionary, and will only be reviewed for abuse of discretion.

7. SAME—EVIDENCE.

On the trial of a mail carrier for embezzling a letter and stealing a bill therefrom, the letter being one of two decoy letters bearing a printed address to the same person, a witness for the government testified that he placed both the decoy letters in defendant's pigeonhole, with others, for delivery. Another carrier, as a witness for defendant, testified that he found two letters so addressed in his own pigeonhole, and placed them in the "misbox." Held that, to prevent an inference by the jury that they were the decoy letters, and that the one embezzled may have been retained by the last witness, it was competent for the government to show in rebuttal by a clerk in the office that he found two such letters in the misbox, and redistributed them into defendant's pigeonhole.

Wallace, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York. The plaintiff in error was convicted, after trial, upon an indictment under section 5467, U. S. Rev. St. [U. S. Comp. St. 1901, p. 3691], for larceny and embezzlement from the mails. He was a letter carrier employed in the postal department at the city of New York. The facts sufficiently appear in the opinion.

Max J. Kohler, for plaintiff in error.

Clarence S. Houghton, for the United States.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The accused's route was known as "No. 21," and included the rectory of the Church of the Most Holy Redeemer. In order to make a test of the faithfulness of the carrier on that route, two post-office inspectors prepared two decoy letters. Each of them contained two \$1 bills, of the variety known as "silver certificates," specially marked by the inspectors, and folded up in a double sheet of note paper, on which was written a request to be admitted to membership in some church society, and the statement that the money was for the same, signed with a fictitious name and address, the whole inclosed in an envelope, addressed "Rev. Father Rector,

Church of the Most Holy Redeemer, 173 East Third Street, Bet. Avenues A and B, New York City." One of these decoy letters also bore the notice, "If not called for in ten days, return to Dora Lynch, 22 Myrtle Ave., Bridgeport, Conn." The address was printed, apparently indicating that the envelope was one of a number prepared by the church for distribution among persons from whom some return was expected, and the testimony indicated that the coming into Station D of similar printed envelopes for the rectory was a not infrequent occurrence. On October 8, 1902, the inspectors, having sealed both envelopes, put a stamp on each, and postmarked them "Bridgeport, Conn., and "Montgomery, N. Y.," respectively. They then gave them to Rothman, superintendent of Station D, where defendant was employed. Rothman gave them to his chief clerk, Brucher, who had the receiving stamp put on—what is called the "back stamp," showing the date of their arrival at the office—and who then deposited them in the carriers' separation cases. Rothman saw him stamp them, and saw him deposit them in the cases, "one in the first case and one in the second case." There were seven of these separation cases, each consisting of 22 pigeonholes, representing 22 routes. In each case the pigeonholes for the respective routes were similarly located, so that Bromberger's pigeonhole, 21, was next the pigeonhole of the carrier on route 22, one Kiechlin. These decoy letters were placed in the pigeonholes shortly before 12 o'clock. The several carriers for the 22 routes, according to usual routine, took the letters out of their respective pigeonholes (an operation known as "skinning"), making several trips to the cases for that purpose, and carried them to their desks, where they sorted and bunched the letters for their delivery trip. About 12:30 they left the station, and about an hour thereafter the accused delivered one of the letters (the one postmarked "Montgomery") at the correct address. Within a few minutes thereafter he purchased a paper of tobacco at a store No. 108 Avenue B, and paid for it out of a dollar bill. About an hour later, upon being questioned by the inspector about the undelivered letter, he disclaimed all knowledge of it; and shortly thereafter one of the marked bills, which had been enclosed in the missing letter, was found in the cash register of the store at which the accused had purchased the tobacco. None of the above-recited facts were in dispute upon the proofs.

The testimony left it doubtful whether the two letters were originally placed in the pigeonhole assigned to the accused or the adjoining one assigned to Kiechlin. Brucher testified with great positiveness that he put them in Bromberger's boxes. "I went there," said he, "with that intention, and am positive that I put one of those two letters in the box marked 21 in the first distributing case to the right, and the other in the box or pigeonhole marked 21 in the second distributing case to the right. * * * I am positive I did not put them in Kiechlin's box. There can't be any doubt about it." He further testified that from some convenient position he thereafter stood and uninterruptedly watched the boxes in which he had placed the letters for about 20 minutes, until he saw the accused come to the cases and "skin" those two boxes. On the other hand, Kiechlin

testified that about noon of the same day, just after he made a "skinning" of his boxes, and while he was sorting their contents at his desk, he found two letters similarly addressed in print to the Rev. Father Rector; that, seeing they were not for his route, he put them in the misbox case; that he said to the accused, "I have got two letters for your route, and I am going to misbox them;" and he remarked at about the same time, loud enough for accused to hear, "These fellows must take me for Hanlon," or "Here is a nice fat one for Hanlon." According to the usual course of the office, letters misboxed are immediately placed in the pigeonhole of the carrier for whom they are intended, and one of the clerks (Hoyler) testified that at about a quarter past 12 he found two letters similarly addressed in print to the Rev. Father Rector in the misbox case, and placed them in the pigeonhole of the accused. Inasmuch as the addresses on the decoy letters were printed, and similar printed addresses on letters for the rectory had been received at the station before, it is apparent that the identity of the two which were found in the misbox with the two decoys is not necessarily established by the evidence of Hoyler and Kiechlin. In the not improbable event that there were received at Station D on that forenoon two genuine printed rectory letters, the testimony of Brucher, Kiechlin, and Hoyler would be reconciled.

The accused testified that he received one letter only, the one he delivered at its address. He also introduced testimony to show that about 1 o'clock on the day in question a letter carrier other than himself, but who could not be identified, paid with a \$1 bill for a purchase of tobacco at store No. 108 Avenue B, and that a number of letter carriers come to that store every day to make purchases. When the person in charge at the store, at the request of the inspector, searched in his cash register for and found the marked bill, there were other dollar bills in such register.

The evidence pointing to the conclusion that the accused received a letter which he did not deliver, and that he appropriated one of the dollar bills contained therein to the purchase of the tobacco within a couple of hours after receiving it, although circumstantial, fully warranted the verdict of the jury, and we find no force in the contention of plaintiff in error that the court should have advised the jury to acquit upon the theory that the evidence was insufficient to establish guilt.

Of the 23 assignments of error it will not be necessary to refer to any which were not relied upon in the brief and not discussed on the argument. The brief presents the usual contention that both counts of the indictment are bad because the subject-matter of the alleged larceny is not described in the language of the statute. Eliminating unnecessary clauses, the statute (Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691]) reads:

"Any person employed in any department of the postal service, who shall secrete, embezzle, or destroy any letter * * * intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, * * * and which shall contain any note, bond, draft, check, warrant, * * * certificate of stock, or other pecuniary obligation or security of the government, or of any officer

or fiscal agent thereof, of any description whatsoever, * * * or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter * * * which shall have come into his possession, either in the regular course of his official duties or in any other manner whatsoever, * * * shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

The indictment charges that the accused "being then and there employed in a department of the postal service, to wit, as a letter carrier attached to Station D," etc., "did unlawfully and willfully secrete, embezzle, and destroy a certain letter, which was intended to be conveyed by mail, the same letter having been intrusted to him and had come into his possession as such letter carrier by virtue of his said office and employment, and was then and there addressed and directed as follows: [setting it forth]. And the same letter then and there contained articles of value; that is to say, two silver certificates of the United States, each of the denomination and value of one dollar," etc. In a second count the indictment charges that the accused, being then and there employed, etc. (repeating the description given in the first count), "did unlawfully and feloniously steal, take, and carry away certain money, to wit, a silver certificate of the United States of the denomination and value of one dollar, the property of one William T. Mayer [the inspector who prepared the decoy letters], * * * from and out of a certain letter which then and there had come into his possession as such letter carrier, and by virtue of his said office and employment"—setting forth the address on the letter. The pleader has manifestly carefully conformed to the language of the statute. Cases are cited to the effect that bank notes are not the subjects of larceny at common law, and that under a federal statute of 1790 (Act April 30, 1790, 1 Stat. 114), making it a crime to take and carry away the "personal goods" of another, "bonds, bills, and notes, which are choses in action," cannot be held to be personal goods. All of which is interesting, but irrelevant. It is contended that the second part of the section "applies only to cases where postal clerks take valuable contents from mail matter which did not come lawfully in the first instance into their possession"—a most glaring misreading, for the language of the statute is, "either in the regular course of his official duties or in any other manner whatever." It is insisted that there is an irreconcilable repugnancy between the terms "theft" and "embezzlement"; that, therefore, both counts cannot stand, and that acquittal should have been directed on the second one; that the first count is itself defective because inconsistent and repugnant in charging in the same count a destruction as well as an embezzlement and secretion of the same letter. Much argument is presented in support of these propositions and authorities are cited, which, although they have no reference to the statute under consideration, abundantly show that courts have frequently gone to the extremest verge of casuistry in finding technical defects on which to reverse criminal convictions. See particularly *U. S. v. Dow*, Taney, 34, Fed. Cas. No. 14,990. The sufficient answer to all this, however, is that we are dealing not with the common law, but with a specific statute; that such statute provides for

two different things, viz., the letter or package which contains the valuable article and the valuable article which is contained in the letter or package. We must confess that we are wholly at a loss to understand why a person who embezzles a letter may not also secrete it till he reaches a convenient place, and may not then also destroy it; nor why he may not at the same time "take" from it whatever valuable contents it may inclose, nor why all these acts may not take place at substantially the same time and as part of the same transaction. Moreover, it seems to us that mere inspection of a United States silver certificate should be sufficient to satisfy any one that it is a "pecuniary obligation or security of the government," and certainly on October 8, 1902, it was an "article of value." The accused was in no way misled by the pleader in calling such certificate "money" in the second count, for the charge was specific that he took and carried away a silver certificate of the United States of the denomination and value of \$1.

It is further contended that both counts are bad because "the marks, numbers, and particulars on the certificates * * * were not set forth." Of the numerous cases cited in support of this proposition, some have no application. See *Moore v. U. S.*, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422, where an indictment charging a postal clerk with embezzlement of \$1,652 in money of the United States, the property of the United States, was held defective because it failed to aver that the same came into his possession in his capacity of postal clerk. Others support the contention, but are wholly unpersuasive. See *U. S. v. Fisler*, 4 Biss. 59, Fed. Cas. No. 15,105, where an indictment for forgery of United States postal currency was held bad because it did not set out an exact copy of the thing forged, although, after the averment that it was "in substance as follows," the actual forgery itself was pasted on the face of the indictment. Others again hold that the indictment is good if it contains a substantive description of the subject-matter, sufficient to inform the accused of what he was charged with taking, and to protect him from being again put in jeopardy for the same taking. *Jones v. U. S.* (C. C.) 27 Fed. 447. This seems to be the correct rule, and it is conformed to when the indictment gives the particular kind of obligation of the United States and the denomination of such obligation, coupled with a specific description of the letter in which it was inclosed. The suggestion that the jury may have supposed that some letter or letters other than the "Dora Lynch" one were what the grand jury intended to charge the defendant with embezzling is absurd.

Among the errors assigned are those to the rulings which led to the exclusion of the evidence offered by the accused to show who Hanlon, the person mentioned by the witness Kiechlin, was. The evidence was offered for the purpose of showing that Hanlon was a former letter carrier on the route of the accused, who had been convicted through decoy letters addressed like the two intended for the accused. It is contended that Kiechlin's remark suggested that the two letters placed by him in the misbox were decoy letters, such as had been used to entrap Hanlon; that, since it was made in the hearing of the accused, it was a remark likely to arouse his suspi-

cions also, and to put him on his guard against temptation, so that he would be unlikely to embezzle the letters, and more wary in disposing of their contents. Everything that was said in the presence of the accused prior to his starting out upon the occasion in question was admitted in evidence. The only bearing which Hanlon's identity could have upon the controversy was to furnish some support for the argument that the accused would not have embezzled letters to which his attention was called in so public a manner, under circumstances which might lead him to suppose he was being "tested" at the time. It may well be doubted whether, in any circumstances, matters so obviously collateral may be inquired into; but the majority of the court are satisfied that in the exclusion of the evidence offered as to Hanlon's identity there was no harmful error. The evidence of guilt was so convincing that the argument as to the accused's resisting the temptation because he was forewarned has little weight. It may equally well be argued that his knowledge that others knew from Kiechlin's statement that the latter had test letters in his hands might lead defendant to suppose that his chance was good to convert one of them and cast suspicion on his fellow employé. But it is not necessary thus to speculate. Hanlon's identity was sufficiently established to admit of the argument being made. The jury in fact knew who Hanlon was. In response to a question put by defendant's counsel, Kiechlin testified that Hanlon was "the man who was robbing the church on that route ahead of Bromberger." That answer was stricken out (it would perhaps have been wiser to have left it in), and, although the jury were not instructed to disregard it, we may assume that they understood they were to discharge their minds of it as completely as if they had not heard it. Possibly this is a violent assumption in a criminal trial, if the evidence thus stricken out is favorable to the accused, but the case must be decided as if it were not present in the jurors' minds. It did appear that Hanlon was the letter carrier who formerly had the defendant's route, and who was no longer in the service; that Kiechlin, after sorting what he had taken out of his boxes, said to the defendant that he had two letters for his (Bromberger's) route, and was going to "misbox" them (the defendant's story is that he said, "I have something for you for the church, and am going to misbox it"); that thereupon Kiechlin rose, and walked over towards the misbox, and on his way said in a voice loud enough for the clerks and for Bromberger to hear, "They are taking me for Hanlon;" that he (Kiechlin) thus "gave them all a hint that I wasn't taking any letters of that sort, of any kind," because, as he added, "I thought some one was trying me to see if I would keep those letters." Later he said there "wasn't anything suspicious about those letters," but it matters little what he really thought about them. His public announcement challenged the attention of Bromberger, to whom he had just said he had letters for route 21, which he was going to misbox; that there was something about them which induced him to proclaim aloud that he wasn't a Hanlon. It is difficult to understand how any intelligent juror, in the light of all the testimony, could have escaped the conviction that there was something about Hanlon's methods

that made a letter carrier solicitous to avoid repeating them, and that the defendant's attention was challenged to the fact that the letter or letters for his own route, formerly Hanlon's, which Kiechlin was then about to misbox, had something about them which induced Kiechlin thus loudly to proclaim the difference between himself and Hanlon. We utterly fail to see how any argument in favor of the defendant's innocence, or any suggestion that Kiechlin was the guilty party, could have been at all fortified by the retention in the record of the testimony which was stricken out.

It is contended that an acquittal should have been directed because the proof showed that the letter in question was not "intended to be conveyed by mail," but was a test letter, intended to be intercepted. This suggestion is wholly without merit. The letter, with the "back stamp" of the station on it, was placed in the carrier's pigeonhole with the other letters there placed for him to take, sort, and deliver to the proper addresses. The expectation that it might be intercepted by a dishonest carrier or clerk in no way destroyed its character when once regularly deposited in the mail, so stamped and addressed as to make it the duty of honest clerks and carriers to pass it forward to its destination. Section 5468 provides that the fact that any letter has been deposited in any post office or in any other authorized depository for mail matter shall be evidence that the same was "intended to be conveyed by mail" within the meaning of section 5467. The case cited, *U. S. v. Hall* (D. C.) 76 Fed. 566, does not apply. There the letter was addressed to a fictitious person at a fictitious address, and the officers who had placed it on the table where the accused clerk found it intended, if he did not take it, to themselves remove it from the mails, since "it could not be delivered to any such person at any such address."

It is further contended that the government failed to make out a case because it did not show that no two silver certificates bear the same number, and the brief states that the "bill in question is identified through its serial number alone." This, again, is a gross misstatement of the evidence. The post-office inspector who prepared the decoy letters testified that he copied the serial number and the date of each of the bills inclosed, and also made a private mark on each bill, viz., an ink dot on the letter O in the word "One" on the face of each bill. The other inspector corroborated him. The bill obtained from the store where the accused got the tobacco was produced on the trial, and the inspector testified that it was "one of the one-dollar bills that was placed in the letter postmarked 'Bridgeport.'" He didn't say how he identified it. No one asked him any such question on either direct or cross examination. Presumably such question was thought to be an idle one when the bill was present, and every one—counsel, witnesses, and jury—could tell from mere inspection whether the three earmarks, number, date, and ink dot, were collectively present. If they were, identity would seem to be established beyond any reasonable doubt.

At the opening of the cause counsel for the accused asked to have the witness Kiechlin excluded during the trial. The only ground assigned was that he was a hostile witness subpoenaed by the defense. This re-

quest was refused. Such refusal is discretionary with the trial judge, and will not be reviewed when no abuse of discretion is shown. See cases cited in 21 *Encycl. Pleading & Practice*, pp. 982-986. No such abuse is shown here. Certain errors assigned to the admission in evidence of the silver certificate, and of a copy of the contents of the missing letter may be disposed of in like manner. They deal with the order of proof only, and that is discretionary with the trial judge. The same may be said of the checking of defendant's counsel when upon his opening, after stating that the defense proposed to call among other witnesses one Kiechlin, who was a hostile witness, and that his hostility was evidenced by what took place regarding him before the commissioner, he was about to state in detail what did occur before the commissioner. Indeed, the matters referred to were of such doubtful relevancy that it might be expected that a careful trial judge would have kept them from the jury till it could be seen as the testimony developed whether there was any possible theory on which evidence of what took place regarding the witness before the commissioner could be admitted.

It is assigned as error that the court allowed the government, on rebuttal, to call Hoyler, and show by him that he found two printed "Rev. Father Rector" letters in the misbox, and placed them in the pigeonholes of the accused. The *prima facie* case, by the testimony of Brucher, traced the decoy letters direct from Bromberger's boxes to his hands. Then the defendant called Kiechlin to show that he found two similar printed letters in his boxes, and that he misboxed them. This made an apparent conflict with Brucher, and might have warranted the jury in finding that Brucher made a mistake by putting the decoys in box 22 instead of 21, and that Kiechlin, getting them out of that box, kept one and misboxed the other, which came to the accused, and was by him delivered. The prosecution was clearly entitled on rebuttal to show that somebody (the jury might infer it was Kiechlin) misboxed two printed envelopes. The circumstance that, when this evidence came in, there was an easy explanation harmonizing the testimony of Brucher, Kiechlin, and Hoyler on the theory that genuine printed rectory letters were in the station that day besides the decoys, did not warrant its exclusion.

The District Attorney, in his summing up, commented sharply on the attempt to show that Kiechlin was the guilty person, and on the possibility of two genuine letters having been made way with at the same time as the Bridgeport decoy. That did not necessarily follow, for, if the two rectory letters which Hoyler found in the misbox were genuine, they may not have reached the carriers' separation cases in time for Bromberger to get them before he started. The exceptions to refusal of the court to check counsel for the prosecution when summing up are without merit. Necessarily that part of the trial must be left largely to the discretion of the trial judge, and the above statement indicates that there was no abuse of discretion in this case.

Some additional assignments of error do not call for any extended discussion. It is sufficient to say that they are, in our opinion, unsound.

The judgment is affirmed.

WALLACE, Circuit Judge (dissenting). I agree with the majority of the court that the evidence upon the trial fully warranted the verdict of guilty. Nevertheless, the question of the defendant's guilt was one for the jury, and, if he was deprived of introducing evidence, however slight its value might be, tending to show the possibility of his innocence, his exceptions to the rulings should entitle him to a new trial. I think he should have been permitted to show that Hanlon, the person mentioned by the witness Kiechlin, was a former letter carrier on the route of the defendant, who had been convicted of embezzlement and of larceny through decoy letters addressed like the two intended for the defendant. Kiechlin's remarks suggested his suspicion that the two letters placed by him in the misbox were decoy letters, such as had been used to entrap Hanlon. They were made in the hearing of the defendant, and were likely to excite his suspicion also, and lead him to exercise unwonted caution to avoid being detected. The argument that, after his attention had been called to the character of the letters, he would be unlikely to embezzle them, or more wary in disposing of their contents, was one which could have been legitimately addressed to the jury; and, in view of the evidence introduced in his behalf tending to throw doubt upon his guilt, might have influenced their verdict. The exclusion of the evidence cannot be disregarded because the evidence may have been of trifling value. For this reason I think the defendant is entitled to a reversal of judgment and a new trial.

(128 Fed. 355.)

GIDDINGS et al. v. FREEDLEY et al.

(Circuit Court of Appeals, Second Circuit. January 6, 1904.)

No. 53.

1. **FIXTURES—BELTING IN MILL.**

A leather belt, which transmits the power from a stationary engine to a main shaft for the operation of the machinery of a marble mill, is a part of the realty, and is not subject to attachment and removal as personal property.

2. **TRIAL—EXCEPTIONS TO CHARGE.**

Where a single exception to a charge covers several distinct propositions, it is inoperative if any one of the propositions is sound.

3. **WRONGFUL ATTACHMENT—EXEMPLARY DAMAGES—MALICE IMPUTABLE TO OFFICER.**

Where officers, having in their hands for service a writ of attachment for \$12,000, at the instance of the attachment plaintiff seized and removed only the main belt in a marble mill, worth not to exceed \$20, but the effect of which was to stop the operation of the mill, when there was unincumbered real and personal property belonging to the defendant and subject to attachment sufficient in value to satisfy the writ, a jury is justified in imputing to them the malicious intent of the attaching plaintiff, and in awarding exemplary damages against them in an action for the trespass.

4. **SAME.**

Officers who, by the wrongful and illegal execution of a writ of attachment, stop the operation of machines, may be subjected to the payment

¶ 4. See *Sheriffs and Constables*, vol. 43, Cent. Dig. § 307.

of damages for the loss of use of such machines, and it is no defense that in the lawful execution of the writ they might have seized and removed the machines.

In Error to the Circuit Court of the United States for the District of Vermont.

This cause comes here upon writ of error to review a judgment of the Circuit Court, district of Vermont, against the plaintiffs in error, who were defendants below. The action is for trespass, and the judgment was entered upon verdict of a jury in favor of defendants in error for \$996. The facts sufficiently appear in the opinion.

For opinion below, see 119 Fed. 438.

James L. Martin, for plaintiffs in error.

F. M. Butler, for defendants in error.

Before LACOMBE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

LACOMBE, Circuit Judge. The plaintiffs, citizens and residents of Pennsylvania, owned a marble mill operated by steam, and a quarry connected therewith, all in Dorset, Vt. On April 8, 1902, a writ of attachment in favor of one Gilman B. Wilson, of Dorset, against the senior plaintiff, William G. Freedley, was duly issued, in which the ad damnum was \$12,000. This writ was seasonably placed in the hands of defendant Giddings, of Manchester, a constable having authority to serve the same. Under the laws of Vermont, such an attachment can be served upon real property only by delivering a true and attested copy of such attachment, with a description of the estate attached, to the party whose estate is so attached (or leaving same at his place of abode), and by filing the same in the office where by law a deed of such real estate is required to be recorded. In Dorset such office would be that of the town clerk. In the case of personal property the writ of attachment may be executed in either of two ways. The officer serving the process may lodge a copy of the same, with his return, in the town clerk's office, "which lodgement shall hold the property against all subsequent sales, attachments, or executions, as if it had been actually removed and taken into the possession of the officer." Or the officer "may remove the [personal property attached] and take it into his possession, in which case he need not leave a copy of the attachment in the * * * clerk's office." Vt. St. 1101, 1103, 1108. On April 10th Giddings went to the mill, found one Nadeau, plaintiffs' superintendent, in charge, explained to him what his business was, and showed him the writ. He told Nadeau that in order to make said attachment upon the personal property it was necessary to take possession of the mill, and asked Nadeau to assist him in getting things into shape, as he wished to take possession some time during that day. To this Nadeau assented. A memorandum was made by Giddings of the property to be attached. He made a copy of the writ, and indorsed upon it a list of the property attached by him—derricks, movable machinery, finished and unfinished marble, etc.—and arranged with Nadeau for the latter to act for him as keeper of said property. No effort was made to remove any of the personal property.

On Saturday, April 12th, Nadeau telegraphed Giddings that he wanted to be released as keeper of said property, and on the following day declined to continue as keeper, and surrendered the keys to Giddings, who had come to Dorset in response to the telegram. The latter fastened up the doors of the mill, including engine house and boiler house, by nailing strips of board across them. He removed none of the property, put no one in charge, and left it boarded up as described.

On the next day plaintiffs, without Giddings' knowledge or consent, knocked off the strips of board, entered the premises, and proceeded to operate the mill, which fact was at once made known to Giddings by Gilman S. Wilson. Giddings went again to the mill on Tuesday, April 15th, and had an interview with Nadeau. Giddings' version of the interview is that Nadeau stated he intended to hold the property by force, that he had help enough to defend it, and would throw Giddings into the brook if necessary. Nadeau denies that he said anything of the sort, although he admitted that he refused to give Giddings possession of the mill. Our attention is called to no provision of law which authorized the attaching officer to take possession of the real estate. Under the verdict of the jury, all disputed questions of fact are to be considered in this court as resolved against the defendants. The next day Giddings called on the defendant Henry S. Wilson, of Arlington, high sheriff of the county, to assist him in executing the attachment. Having consulted with a firm of lawyers, the two defendants went to the mill on April 17th, and it is their joint action on that day which is the subject of this action. Freedley and Nadeau were both present, and the mill was in operation. Giddings testified that he repeatedly requested that the mill should be shut down, and the attached property surrendered to him as attaching officer, and that upon Nadeau's continued refusal he notified him that he would shut down the mill and the main belt. Nadeau's story is that he never objected to the officers taking away or moving or taking hold of any of the personal property that was on the list, and that he told them "if they took the main belt they would have to take it by force; they would have to use force, and stop the engine themselves." Evidently the jury believed Nadeau's version to be the correct one; not unnaturally, since both officers admitted they entered the premises with the intention to remove the main belt, well knowing that would have the effect of shutting down the mill. Upon Nadeau's refusal to shut down the mill and deliver up the main belt, Giddings broke open the doors that led into the boiler room and into the engine room, and the defendant Wilson, under the direction of Giddings, then cut the lacing of the belt, and Giddings caused it to be carried away. Thereupon the officers left without removing or undertaking to remove a single item of the personal property they claimed to have attached.

The first question raised on this appeal is whether the main belt was personal property. If it were, defendants were protected by their writ; if it were not, they were trespassers.

The plant was operated by an 80 horse power steam engine and two boilers, which were located in a room attached to the mill building. The engine was set on a solid foundation of masonry, composed of

stone and brick, three or four feet high, which was called the engine bed. Underneath this bed, and resting on the earth, were anchor stones to which the engine was fastened by iron rods running through the bed, and through the anchor stones, for the purpose of holding the engine immovable on its bed. The engine was connected with the main line shaft by the main belt, above referred to. This was a double leather belt, 24 inches in width and several feet in length. It extended from the drive wheel of the engine to a pulley on the main line shaft. The engine had no fly wheel or balance wheel. The belt is the sole means by which power generated on the engine shaft is transmitted to the main shaft, which latter is the immediate source of power on which the various and steam-driven machines and working devices are entirely dependent for their operation.

The question is to be determined not as it would be under the rules which public policy requires to be laid down when a tenant, for the use of his own business, has put mechanical appliances in his landlord's building, but under the rules which apply as between vendor and purchaser. In *Newhall v. Kinney*, 36 Vt. 591, the court held that "a levying creditor, in the eye of the law, is a purchaser of the property set off to him in satisfaction of his debt against the judgment debtor," and that an attachment of the debtor's real estate, followed by a levy upon a "sawmill," includes a circular sawmill, which is in and constitutes a part of the sawmill. The court says:

"The simple fact that the circular sawmill might be removed, and another substituted in its place, without material injury to other parts of the building, is not determinative of whether it was intended to pass to the purchaser, or to a party who stands in the relation of a purchaser, upon a conveyance of the property. Such removal and substitution can be made of almost any other part of a sawmill, of the doors, windows, water wheel, sills, ridge pole even. But when once fitted up with these, or with a circular sawmill, the removal thereof without a substitution takes away an essential part of the sawmill, and the purchaser * * * would fail to receive the property he bargained for under the description 'sawmill.'"

The case of *Kendall v. Hathaway*, 67 Vt. 122, 30 Atl. 859, where a circular sawmill so attached that it could be readily removed was held to be personal property, is not in conflict with *Newhall v. Kinney*, because in the later case the circular sawmill was put in a building which had been erected on land already covered by a mortgage, under circumstances which the court found evidenced an intention to keep it in the building "only so long as the owners might desire." In *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 306, 38 Am. Dec. 368, the court held that a steam engine and boilers, and all the engines and frames adapted to be moved and used by the steam engine, by means of connecting wheels, bands, or other gearing, as between mortgagor and mortgagee, are fixtures or in the nature of fixtures, and constitute a part of the realty. After pointing out that the mode of attachment is "far from constituting the criterion" by which to dispose of the question, the court says:

"The difficulty is somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined, as to be occasionally connected or disengaged, as the objects to be accomplished may require. In general terms, we think it may be said that when a building is erected as a mill, and the waterworks

or steamworks which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, * * * they are parts of [the mill], and pass with it by a conveyance, mortgage, or attachment."

This case is cited with approval in *Hill v. Wentworth*, 28 Vt. 428, where the court says:

"The iron shafting put up in the building for the purpose of turning and putting in motion the machinery * * * we are disposed to regard as a constituent part of the mill. The shafting was necessary to communicate the motive power to the machinery, and should be regarded as a part of the mill as much as a water wheel by which a water power is called into existence."

To the same effect is the following excerpt from *Harris v. Haynes*, 34 Vt. 220: "Understanding the object and purpose of the annexation of the engine and its adjuncts to the realty to have been the furnishing of motive power to the machinery of the shop, and having reference to the manner in which they were fitted and adapted to the shop and the business carried on there, we are of opinion that" the engine and boilers, arch mouth and grate, and certain shafting and pulleys were fixtures. In *Keeler v. Keeler*, 31 N. J. Eq. 190, it was held that the "machinery and apparatus for furnishing motive power" were a part of the realty. "The steam engine is securely and permanently bolted to a foundation, * * * and was put in for permanent use. It, with its appurtenances, is part of the realty, and so are the boilers, which are a necessary adjunct to it; also the shafting, belting, coupling, and pulleys to communicate the power; and also the water wheels and water wheel governor." The precise question now presented was considered in *Burnside v. Twitchell*, 43 N. H. 394, where the court says:

"The belting also of a mill runs from the large wheel connected with the motive power over a drum upon the main horizontal shaft, upon which are various other drums, upon which are belts connected with the various distinct portions and parts of the machinery. Whether the belting could be removed whole without removing any of the machinery, or whether, as is the case ordinarily, it could not be disengaged from the drums and shafts altogether, without removing some of the permanent parts or attachments of the mill, or by disuniting the belts by removing the thongs by which the ends are usually fastened together, the case does not show. But when a mill of any kind is constructed so as to make belts necessary, in order to run the mill, they would seem to be a part and as essential a part as any other of the mill. Some gristmills are constructed in this way, with a belt attached to the main shaft and connected with each run of stones, another to the belt, another to the smutmill, etc.; others are constructed with a large cogwheel, with other smaller cogwheels, that can be thrown into it or upon it, to carry each of the other several parts of the machinery. In one case the drums and belts perform the same office that the wheels and gearing do in the other. The belting is as necessary as the drums, and both are as necessary in one case as the cogwheels are in the other, one of which might be removed, perhaps, with as little trouble as the other. Why, then, should the cogwheels be considered as a part of the mill, and the belting not be so considered?"

We are entirely in accord with these propositions, and do not find anything in the cases cited to us from the Vermont Reports which would prevent their application in the case at bar. It is conceded by defendants that the engine which supplies the motive power for the mill is real estate, and the belting by means of which such power is transmitted from the engine to the main shaft is certainly an adjunct of the engine. Without it or its equivalent the engine would

not discharge the function for which it was erected—it would not supply motive power to the mill. It would hardly be contended that if the power were transmitted by cranks, or by a pitman, or by a train of gearing, such devices were not fixtures, and there is no sound reason for reaching a different conclusion when the transmitting device is a leather belt. We conclude, therefore, that defendants had no right to seize and remove the main belt as personal property under the writ.

Defendants next assign as error that “the court did not correctly instruct the jury on the subject of exemplary damages.” Reference to the brief shows that it is contended that two propositions should have been called to the attention of the jury, viz.: (a) That, “when defendant acts on the advice of counsel in the commission of the act complained of, such fact should be considered on the question of exemplary damages”; and (b) that, “where the only evidence of malice is the presumption which arises from the mere doing of an unlawful act, if it is shown that the defendant acted in good faith, and on the advice of counsel, exemplary damages are not recoverable.” The trial judge was not requested to charge either of these propositions, nor, indeed, did defendants ask for any instructions whatever on that branch of the case. The court charged the jury at some length on the subject of exemplary damages, telling them that if they found the purpose was to shut down the mill instead of making a fair attachment; to oppress Freedley & Son by taking an unfair advantage of them; if defendants’ action was high-handed and oppressive, and done with a wrong purpose to do damage unlawfully—the jury might add what was right to the damages by way of example. The only exception reserved to this part of the charge was “to the instructions on the question of exemplary damages, and to the instruction that exemplary damages may be recovered in this case against both defendants.” The first part of this exception is too indefinite. It is not contended that the charge on this branch of the case was wholly erroneous. Manifestly no such contention could be made, for the doing of an illegal act with a wrong purpose to do damage unlawfully would certainly support a claim for exemplary damage. Where a single exception covers several distinct propositions collectively it is inoperative, if one of the propositions is sound. The defendants should have called the court’s attention to the particular propositions complained of, and, if it were thought the instructions should be made fuller, have stated precisely what they wished to have charged. The exception, however, sufficiently raises the question whether the evidence warranted the jury in giving exemplary damages.

It appears that defendants had no personal acquaintance with Freedley, and had no ill will towards him. Nevertheless, if they willingly and knowingly allowed themselves to become the tools of another person, whose object was apparently malicious, and carried out an unlawful act in a high-handed and oppressive way, the jury would be entitled to find their conduct malicious, and to punish it by assessing punitive damages. The evidence quite clearly shows that this was just what they did, and we need not look beyond their own admis-

sions for proof. The real estate was valuable and unincumbered. There was personal property worth several thousand dollars. The mere filing of a copy in the town clerk's office would have effected a levy on all the property. The defendants filed no copy, and thus made no effort to secure the real estate. Out of the personal property they seized and removed only the main belt, worth less than \$20. The defendant Sheriff Wilson admitted that ordinarily he would have looked up the title to the real estate and attached that by filing copy, and that in the ordinary course of serving a writ he would not have removed the main belt. The defendant Giddings had a conversation with Wilson, who sued out the attachment, and after that conversation went to the mill with the intention of removing the main belt. Both defendants took legal advice before they seized the belt, but the lawyers they consulted were the counsel of the attaching creditor, who told them to remove the belt. Both knew perfectly well that their seizure of the belt would effectually shut down the mill, and entail a loss far in excess of the \$20 they secured thereby. They admit that ordinarily they do not require a bond of indemnity from the attaching creditor where there is no question as to the ownership of the property they are about to levy on, but that when the circumstances are "rather peculiar—out of the ordinary"—they do require such security. They quite wisely concluded that the circumstances of this case were rather peculiar, and before electing to seize a \$20 leather belt for a \$12,000 claim, instead of filing copy in the clerk's office, Giddings asked Wilson, of Dorset, for a bond of indemnity, which was given; thereupon the latter "told [him] what to do," and he did "just what he told [him]." Comment is superfluous.

Defendants reserved an exception to this excerpt from the charge:

"Freedley had a right to have his property there undisturbed except by due process of law. If this man living there [Wilson, of Dorset], thought he would oppress Freedley a little by attaching in this way, when he might have done it in another way, and not interfere with his business so, you should add whatever you think is about right."

It is contended that this instruction allowed the jury to punish defendants for the attaching creditor's wrong, when they can only be punished for their own acts. But the charge must be considered as a whole, and we are satisfied the jury could not have been misled by this part of it. It was the acts of the defendants—"peculiar and out of the ordinary"—in assisting the attaching creditor to oppress the plaintiffs, when as intelligent men they must have known his object, which were left to the consideration of the jury.

Exception was taken to instructions which allowed the jury to include damages sustained by the loss of the use of the gangs of saws, which of course could not run when the main belt no longer transmitted power to the main shaft from which (or from some subsidiary shaft) they were driven. The gangs were personal property, and could have been removed. If defendants had directed their attention to them, taken down and removed them, there could be no recovery for the loss of their use. But it would be going too far to hold that damages necessarily resulting from an unlawful act are to

be disallowed on the theory that, if defendants had kept within the limits of the law, similar damages would have ensued. They elected to act outside the limits of the law, and for the damages resulting from their unlawful act they must respond.

Exception was reserved to the admission of evidence, and its submission to the jury, showing damage to the foundation of the engine and engine bed from the sudden stopping of the engine, on the ground that such damages were not specially pleaded. The jury was charged to confine the damages to such as directly resulted from the stoppage of the engine, and the damages testified to seem to be the natural and reasonably to be expected result of the trespass complained of.

The judgment is affirmed.

(128 Fed. 362.)

ALASKA COMMERCIAL CO. v. WILLIAMS.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1904.)

No. 903.

1. AMENDMENT OF PLEADINGS—DISCRETION OF COURT—AMENDMENT CHANGING ISSUES.

It was within the discretion of a trial court to refuse to permit the filing of an amended answer which sets up a new defense materially changing the issues, and which was not offered until after plaintiff had rested, and defendant had occupied two days in introducing evidence.

2. TOWAGE—DUTY OF TOWING VESSEL—LIMITATION OF LIABILITY BY CONTRACT.

A towing vessel cannot relieve itself by contract from liability for the failure to exercise reasonable care and skill in the performance of the service and for the safety of the tow.

3. SAME—ABANDONMENT OF TOW.

A steamer contracted to carry men and freight for a mining company from Juneau to Lituya Bay, in Alaska, and also to tow a small schooner belonging to the company and used as a lighter. The entrance to the bay is narrow, and can only be passed safely at slack tide. Arriving off the entrance the master deemed it unsafe to enter at that time, and, the manager of the company on board refusing to consent that the men and stores should be loaded on the schooner and left outside, he proceeded with the tow up the coast. On the way the hawser parted, but the steamer proceeded without stopping, leaving the schooner adrift in the open sea, with five men on board, none of whom were acquainted with the coast. She was never seen afterwards, and all that was ever known of the fate of the men on board was the finding of the body of one on the beach. *Held*, that the obligation of reasonable care on the part of the steamer continued after leaving the bay, and that nothing in the towing contract would relieve her from liability for the abandonment of the tow, there being nothing in the situation which made such abandonment necessary.

4. WRONGFUL DEATH—JURISDICTION—ABANDONMENT OF TOW AT SEA WITHIN THREE-MILE LIMIT.

A steamer abandoned a small schooner which she had in tow on the parting of the tow line off the coast of Alaska at a point where the coast was dangerous, leaving five men on board, who were not competent to handle the vessel, nor having equipment for her navigation. Neither the schooner nor the men on board were seen again, with the exception of one, whose body was found on the beach. In an action against the owners of

¶ 1. See Pleading, vol. 39, Cent. Dig. §§ 601, 773.

the steamer to recover damages for the death of one of the men under the Alaska statute, the jury returned a special finding that when the schooner was last seen from the steamer both vessels were within three miles of land, and they also found, on evidence which justified such finding, that decedent came to his death within such limit, and before the following morning. *Held* that, although the vessels may have been outside the three-mile limit when the line parted, the duty of the steamer to return to the rescue of the schooner, the failure to perform which was the proximate cause of her loss with those on board, continued, and that an instruction that if the jury found such facts, and that the death resulted from the failure of the steamer to perform such duty, the plaintiff was entitled to recover, was correct.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

On April 12, 1900, the Alaska Commercial Company, the plaintiff in error, was the owner of the steamer *Bertha*, a vessel of about 1,000 tons burden, then plying between Seattle, Juneau, Sitka, and other Alaskan ports. The Lituya Bay Gold Mining Company was a corporation engaged in placer mining at or near Lituya Bay, a bay having no port, and rarely visited, situated on the Alaskan coast about 180 miles northwest from Sitka, and 40 miles from Cross Sound. The mining company had its men, freight, and supplies at Juneau, and had there a schooner called the *Dora B.*, of about 15 tons burden. The steamer *Bertha* being then at Juneau, on her regular trip to the westward, Charles Plaut, the manager of the mining company, entered into a contract with Captain Johansen, the master of the *Bertha*, to take his men and freight and to tow his schooner to Lituya Bay. The schooner was equipped with sails and rigging, but the sails were stowed in the hold, and had never been reefed. The schooner was intended to be used for lighterage purposes in Lituya Bay. Five of the men of the mining company were placed on the schooner by the manager. The remainder, together with the freight, were carried on the *Bertha*. The steamer, with the schooner in tow, proceeded from Juneau, on her regular course westward, through the inland waters, towards Sitka. On the evening of April 14th she arrived at Sitka. From Sitka she proceeded on her way to Lituya Bay through the open waters of the Pacific Ocean, in a northwesterly direction, along the coast. She arrived with her tow off the entrance to Lituya Bay at about 6 o'clock on the morning of April 15th. The entrance to the bay lies through a narrow channel, about 300 feet wide, inclosed by rocks on either side. The evidence is that it is a dangerous entrance except at slack tide, as at other times the breakers extend across the entrance, and the tide runs with a strong current. Upon arriving at the entrance to the bay the captain of the *Bertha* made a careful examination thereof, and concluded that it would not be safe at that time to attempt the entrance. He sent for Mr. Plaut, told him of the difficulty, and advised him to have the schooner hauled up alongside the ship, and to have the remaining members of his party and the freight which were on the *Bertha* placed on the schooner, and to sail the schooner into the bay under her own sails. Mr. Plaut was unwilling to do this. There is evidence that the captain then suggested that he might land his men and freight with small boats from a small cove outside the bay, and that this offer was also declined. The *Bertha* remained more than an hour at the entrance of the bay, and at the end of that time her master decided to go on to Yakutat, which is the next harbor up the coast, and about 80 miles distant to the westward. Yakutat was one of the regular ports at which the *Bertha* stopped on her westward and on her return voyage. It was stated by the captain of the *Bertha* and by another witness that Plaut consented to the continuance of the voyage, and stated that as soon as the weather moderated he would sail back to Lituya Bay. The *Bertha*, with the schooner in tow, proceeded on her course nearly directly west and off shore, and about 10 minutes after 12 o'clock, when opposite an indentation called Dry Bay, the towline parted, and left the schooner adrift. There is conflict of the testimony as to the distance from the vessels to the shore at that time. Some of the witnesses estimated the distance to have been as great as 10

miles, others estimated it at less than 3 miles. The steamer made no effort to pick up the tow, but proceeded on her way under full steam, with sails set, and without stopping or slowing down. The men on the schooner ran up a bowsprit or small jib sail. There was a strong wind, blowing from the south-east. The schooner, sailing with her jib sail, followed the steamer, and remained in sight about two hours. The Bertha continued on her way to Yakutat, where she arrived about half past 3 or a little later that afternoon. The schooner was never seen afterwards, except that it was shown that the hull of a wrecked schooner about the size of the Dora B. was seen on the shore of Alaska near Dry Bay, nor was there any evidence of the fate of the men on board, except that the body of one of them was found a week afterwards on the beach between Dry Bay and Yakutat. The defendant in error, who was one of the men of the mining party carried on the Bertha, was by the probate court of Juneau, Alaska, subsequently appointed administrator of the estates of the men who were lost on the schooner. He was appointed administrator of the estate of the decedent W. D. Baldwin upon the request of the decedent's father, who was next of kin. On March 22, 1902, he commenced the present action in the United States District Court, Division No. 1, for the district of Alaska, claiming damages in the sum of \$5,000 for the death of Baldwin, under the provisions of section 353 of the procedure act of Alaska (Act June 6, 1900, c. 786, 31 Stat. 392). The complaint alleged that prior to the departure of the steamer Bertha from Juneau the mining company, for a valuable consideration, entered into a contract and agreement with the plaintiff in error, whereby the latter agreed to transport a considerable amount of freight on board its steamer Bertha, likewise a number of passengers, and to land the same in Lituya Bay, near and in front of the houses and headquarters of the mining company upon said bay, and to deliver said freight and passengers to said company at said point, and further agreed to tow and transport the schooner Dora B. upon the same trip, and bring her into Lituya Bay, and drop her near and in front of the buildings and headquarters of said mining company, and further agreed to transport upon the said schooner the decedent and four other employes of the mining company. The case was tried before a jury, who returned a verdict for the defendant in error for the sum of \$5,000, and thereupon judgment was rendered. To review that judgment this writ of error was sued out.

Chickering & Gregory, A. K. Delaney, A. Heynemann, and Andros & Hengstler, for plaintiff in error.

Lewis P. Shackleford, John R. Winn, Jno. A. Shackleford, and Piles, Donworth & Howe, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended by the plaintiff in error that the court erred in denying its application to so amend its answer as to set forth the terms of the towage contract. The original answer made no affirmative allegation as to the contract, but contained a general denial of all of the facts alleged in the complaint as to the terms of the contract and the breach thereof. The case went to trial more than six months after the issues were made up. On the trial the defendant in error took all of his evidence and rested. The plaintiff in error, after occupying two days in introducing evidence for the defense, submitted to the court the proposed amendment to its answer. The amendment was not verified, nor was it accompanied by an affidavit. It set up as an affirmative defense what the plaintiff in error asserted to be the terms of the towage contract. It stated, in substance, that the owner of the schooner agreed to

properly man and equip her, and to put her in a seaworthy condition, and to ship thereon a crew of seamen, who could handle her in case of emergency, or in case it should be deemed dangerous or impracticable for the said Bertha to tow the schooner into Lituya Bay; that upon arriving at Lituya Bay the condition of the weather and the tide and sea were such as to make it hazardous for the steamer to enter, and that the manager of the mining company then agreed with the captain of the Bertha that he could proceed with the tow to Yakutat; that one of the conditions connected with the towing of the said schooner would be and that it was agreed and understood that in case of any emergency the said schooner should take care of itself by its crew and sailing apparel and tackle as aforesaid. The amendment proceeded to set up the defense of contributory negligence, alleging that the parting of the towline was due to the contributory negligence of the men on board the schooner in not properly parceling the hawser. The court denied the application on the ground that the proposed amendment radically changed the issues as already made, and substantially changed the cause of the defense. The introduction of the defense of contributory negligence, which had not been embraced in the original answer, radically changed the issues as made, and substantially changed the defense. It was in the discretion of the court to allow or deny this amendment, and in denying it we cannot say that there was abuse of its discretion. It is immaterial what reason the court gave for denying the application. There was no offer of an amendment setting forth only the terms of the contract as the plaintiff in error claimed it to be. If such an amendment had been proposed, there would have been no error in its rejection, for it would have been immaterial and unnecessary. The plaintiff in error had the right, under its general denial, to prove that the contract was otherwise than as alleged in the complaint, and in order to do so was free to introduce evidence to show what the contract really was. 1 American & English Encycl. of Pleading & Practice, 818; Marsh v. Dodge, 66 N. Y. 533; Burley v. German-American Bank, 111 U. S. 216, 4 Sup. Ct. 341, 28 L. Ed. 406.

It is contended, however, and this is the subject of one of the assignments of error, that the court in ruling upon the evidence which was offered by the plaintiff in error had excluded its proffered testimony to show that the terms of the contract were other than as alleged in the complaint. This contention is not sustained by the record. Mr. Plaut, the manager of the mining company, had testified that the contract was one by which the plaintiff in error was to tow the Dora B. to Lituya Bay for a stated compensation. The captain of the Bertha, while testifying on behalf of the plaintiff in error as to his action in departing from Lituya Bay without entering it, was asked the question: "What conclusion did you reach under those conditions in regard to going in?" He answered that he had made up his mind that it was not safe to go in, to take the Bertha in, and added: "I didn't wish to endanger my contract with the company, as it was always the understanding—" Here he was interrupted by counsel for defendant in error, who moved to strike out the latter part of the answer as "voluntary and not responsive." The motion was sustained by the court. Subsequently the same witness was asked to state his reasons for not

slacking up and coming back to the schooner after the towline parted. This was objected to as incompetent, irrelevant, and immaterial. The objection was sustained. The witness was then asked the following question: "Q. In your judgment, taking everything into consideration, as matters were at that time, and you speaking now as a seaman, what did you consider best for you to do, both for yourself and the Dora B., after the latter went adrift? A. Well, there was no other way that I could see than to go on the way I did, because, so far as the schooner was concerned, she was perfectly safe, and if I had thought in any way that she wasn't I would have acted different." It is urged that the court in ruling upon the objections to these questions excluded evidence which the witness was about to give of the terms of the contract, and it is said that in the terms of that contract, as he would have stated them, were to be found the reasons why he did not enter Lituya Bay, and why he did not go back or slack up when the towline parted. To this it is sufficient to say that it was not suggested to the trial court that any such evidence was sought to be elicited from the witness, nor was there anything in the questions as they were propounded to advise the court that such was the case. On the contrary, when the witness did, in response to the last question above quoted, state his reasons for his conduct, there was no intimation in his answer that he relied on the terms of the towage contract as excusing him for not returning to pick up the tow. It would seem, moreover, that the "contract with the company" referred to in response to the first question was not the contract he made with Plaut, but the contract that existed between the witness and his employer, the plaintiff in error, which he feared would be endangered by his entering Lituya Bay under the conditions then existing. How was it possible to endanger the alleged contract which was set up in the proposed amendment by taking the schooner into Lituya Bay at the request of her owner?

But we are of the opinion that if the plaintiff in error had proved the contract to be as in the proposed amendment it was alleged to be, it would not have afforded it exemption from liability in the present case. In the Steamer Syracuse, 12 Wall. 167, 171, 20 L. Ed. 382, Mr. Justice Davis said:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because if it be true, as the appellant says, that, by special agreement, the steamer is liable, if through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

Of similar import are *In re Moran* (D. C.) 120 Fed. 556; *The Somers N. Smith* (D. C.) 120 Fed. 569; *The M. J. Cummings* (D. C.) 18 Fed. 178; *The Jonty Jenks* (D. C.) 54 Fed. 1021.

The contract as set forth in the proposed amendment to the answer related only to the towage from Juneau to Lituya Bay. If it was made as alleged, it afforded no excuse for the conduct of the master of the Bertha in leaving the schooner adrift as he did. His conduct in so doing was not the exercise of reasonable care and maritime skill in conducting the towage service. He admitted that he had no knowl-

edge whether the schooner had on board compass, chart, or other things necessary for navigation. It is not denied that at the time when the towline parted Plaut protested against his leaving the schooner, and told him that the men on board of her were not prepared to navigate her without the aid of any one who knew the coast.

It is contended that the court erred in charging the jury that the contract, which was a contract to tow the schooner *Dora B.* from Juneau to Lituya Bay, required the steamer to take the tow into the bay, and leave her there, and it is argued that, considering the nature of the bay and the hazardous entrance thereto, such a construction of the contract was erroneous, and that the *Bertha* had fulfilled her obligation when she reached the mouth of the bay. We think the court properly ruled otherwise, and that the construction placed upon the contract was the construction adopted by the parties thereto. The *Bertha* had on board nine of the members of the mining company's party and its freight. The captain of the *Bertha* evidently understood that he was to enter the bay. He testified: "I always made a practice to figure on that tide, because the only way we could enter the bay was slack water, either low or high, and I did so this time." He testified also that it was his custom to arrange the time of his arrival there in order to meet slack water if possible. He testified further: "I had two things, that was either to go in or to go on my course to the westward." It was shown that on the return voyage of the same trip the *Bertha* entered Lituya Bay, and landed there the mining company's men and freight, and that in June of the same year she again entered it, and that the captain of the *Bertha*, while in command of another steamer, had entered it in the year 1898 and again in 1899. But whatever may have been the true construction of the contract, the question becomes immaterial in view of the subsequent conduct of the *Bertha* in departing from the entrance to Lituya Bay with her tow on her way to Yakutat. Her obligation to exercise due care and to take the schooner to her destination remained the same as it was before.

It is earnestly insisted that the court erred in giving to the jury the following instruction:

"The obligation of a towing vessel to a tow is a continuing obligation, and if the jury find from the weight of the evidence that, after said towline parted, the schooner *Dora B.*, with the decedent aboard, even if said towline parted outside of the district of Alaska, or beyond the marine limit of three miles, drifted within said three-mile limit, and that the decedent met the cause of his death within three miles of the shore of the district of Alaska, and that said death could have been avoided by the steamer *Bertha* and its master, had said master used that degree of skill and caution which prudent navigators usually employ in standing by, aiding, and succoring said schooner and the decedent while within said three-mile limit from shore, and that said decedent met his death by reason of such failure on the part of the master of the steamer *Bertha*, then you should find for the plaintiff in this case."

It is argued that by this instruction the jury were told that from the time when the towline parted until the death of the decedent there was at each instant of time, and at each point in space, a new wrong committed and a new right created; that is, that the tort was continued, and that the corresponding right continued, and that if the schooner had drifted for instance across the Pacific Ocean, and had subsequently at any time returned within the three-mile limit from the

Alaskan shore, and the decedent had there died, there would have been a cause of action. This argument ignores the salient facts in the case. The jury, in answer to interrogatories propounded by the plaintiff in error, returned several special verdicts, one of which was that the Dora B. was lost on her trip from Lituya Bay to Yakutat, on April 15, 1900. By another special verdict, the jury found that within the two hours during which the schooner was visible from the steamer after the towline had parted both the steamer and the schooner were less than three miles from the land. The evidence was that at the time when the schooner went adrift a strong wind was blowing, and the weather was squally, with mist and snow. There was no evidence that the schooner was equipped with compass or chart, or that more than one of the men on board of her was a sailor, or knew anything about handling a sailing vessel. The schooner had up only her small jib sail, and the evidence was that her other sails were stowed in the hold, and were not rigged for present use. The wind was quartering on her port stern, and the sea was running in obliquely toward the land. The result was a tendency to drift the schooner to the shore. About 3:45 in the afternoon the wind changed to the southwest, so as to send her directly toward the beach. It is the undisputed evidence that between Lituya Bay and Yakutat it is a dangerous sea. Captain Hansen, a witness for the plaintiff in error, testified that he would consider it dangerous to leave any vessel along that coast with a tow, and that good seamanship would require such a vessel in charge of a tow to make the nearest port, which would be Yakutat, with as great haste as possible. The coast survey chart in evidence shows that a continuous range of high mountains, some as high as 16,000 feet, extends along the coast from Lituya Bay to a point back of Yakutat, and it is in evidence that these mountains, covered with snows and glaciers, create uncertain weather and dangerous conditions to navigation along the coast. In view of all these circumstances, it cannot be said that the duty of the steamer in the premises ended with the parting of the towline. Having failed to tow the schooner into the bay, and having started out to take her to Yakutat, it was her duty to complete the voyage to the latter place, unless prevented by circumstances beyond her control. When the towline parted it was her plain duty to return to the rescue of the schooner and take her again in tow. Such undoubtedly continued to be her duty during the two hours in which the schooner was in sight, and while, as the jury found, she was within the three-mile limit from the shore, and such was still her duty thereafter. For how long a time that duty continued it is unnecessary to determine. It certainly existed during that day and so long thereafter as the schooner continued to drift toward the shore, or to proceed on her course toward Yakutat, and so long as the Bertha could have returned and rescued her. Before the morning of the next day she had doubtless been wrecked, and the jury so found. Early on that morning, when the steamer came out from Yakutat Bay and passed Ocean Cape, the point where, according to the testimony of Captain Lennan, pilot of the Bertha, the schooner should have arrived if she had outlived the night, she was nowhere in sight. There was no error, therefore, in the instruction given to the jury, for there was a breach of the steamer's duty com-

mitted within the territory of Alaska. It was not the parting of the towline that caused the decedent's death. It was the continuing failure of the Bertha to come to the relief of the schooner before she was wrecked on the Alaskan shore.

We find no error for which the judgment should be reversed. The judgment is affirmed.

(126 Fed. 327.)

In re STRAUSS.

(Circuit Court of Appeals, Second Circuit. November 25, 1903.)

No. 25.

1. EXTRADITION—FEDERAL COURTS—REVIEW—HABEAS CORPUS.

The power of the federal courts to interfere in interstate extradition proceedings should only be exercised in cases of urgency, where the error is plain and the necessity for federal intervention obvious.

2. SAME—STATUTES—OFFENSE—AFFIDAVIT.

Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], provides that whenever the executive authority of any state demands any person as a fugitive from justice of any other state or territory to which such person has fled, and produces a copy of an indictment or affidavit made before a magistrate of any state or territory charging the person demanded with having committed a felony or any other crime, etc., the accused shall be apprehended. *Held*, that it is not necessary that extradition proceedings under such statute shall be based on an indictment, but that a verified complaint or affidavit charging a person with an infamous crime is sufficient to confer jurisdiction on the Governor of the state to which the defendant has fled.

3. SAME—AFFIDAVIT—SUFFICIENCY.

Where an Ohio statute provided that any person who obtained of another anything of value by any false pretense, with intent to defraud, shall be guilty of an offense which, if the value of the property be \$35 or more, is punishable by imprisonment, an affidavit charging that accused, on a particular day, in M. county, Ohio, unlawfully and falsely pretended to a certain watch company, with intent to defraud it, that he was the owner of a dry goods store in Y., Ohio, which statement was false and known so to be by accused, and by means of such false statement accused obtained from the company jewelry worth \$400, sufficiently stated an offense, under the Ohio laws, to sustain extradition proceedings.

4. SAME—HABEAS CORPUS—SCOPE—QUESTIONS OF FACT—REVIEW.

Disputed questions of fact cannot be reviewed on habeas corpus.

5. SAME—FUGITIVE FROM JUSTICE.

Proof that defendant committed a crime in Ohio, and when sought to be subjected to the criminal process of that state he was found in New York, was sufficient to establish that he was a fugitive from justice.

6. SAME—ARREST—HABEAS CORPUS—PENDENCY OF PROCEEDINGS—BAR.

Where a fugitive from justice was arrested under Code Cr. Proc. N. Y. §§ 828-830, providing for the preliminary apprehension of a fugitive from justice, and his commitment for a period not exceeding 30 days, to enable requisition to be made, the allowance of a writ of habeas corpus for the purpose of testing the validity of such temporary commitment by the magistrate was no bar to subsequent extradition proceedings before the Governor, under Rev. St. § 766 [U. S. Comp. St. 1901, p. 597], providing that pending the proceedings or appeal in extradition proceedings, and until final judgment therein, any proceeding against a person so imprisoned or confined in any state court, or under the authority of any state, for any matter so held and determined or in process of being held

and determined under such writ of habeas corpus, shall be deemed null and void, the proceedings before the magistrate and the Governor being entirely dissimilar.

Appeal from the District Court of the United States for the Southern District of New York.

The appellant is charged with the crime of obtaining \$400 worth of jewelry at Youngstown, Ohio, by false pretenses contrary to the laws of that state. He was arrested as a fugitive from justice and brought before a magistrate of the city of New York, August 11, 1902. Pending the hearing the accused obtained writs of habeas corpus from the Supreme Court of New York, which were subsequently dismissed, and he was remanded to the city prison for further examination. On August 18, 1902, another city magistrate issued a warrant directing that the accused forthwith be brought before him. This was done, an examination was had and the accused was committed, pursuant to section 830 of the New York Code of Criminal Procedure, for a period of 30 days to enable an arrest to be made on the warrant of the Governor in extradition proceedings. The Governor of Ohio having duly made requisition, dated August 13, 1902, the Governor of New York, after a hearing, at which the accused was represented by counsel, issued his warrant, dated August 22, 1902, directed to the police commissioner of New York City, directing him to arrest the accused and deliver him to the duly accredited agent of Ohio to be taken to that state. The warrant recites that it has been represented by the Governor of Ohio that the accused stands charged in that state of the crime of securing property by false pretenses, which is a crime under the laws of Ohio, and that he has fled from that state. The warrant further recites that the requisition was accompanied by affidavits and other papers, duly certified by the Governor of Ohio to be authentic, charging the accused with having committed the said crime and with having fled from Ohio and taken refuge in the state of New York. On August 22d, the same day that the Governor issued his warrant, the United States District Court for the Southern District of New York allowed a writ of habeas corpus, returnable September 3, 1902, to test the validity of the commitment by the magistrate. On the 23d of August the accused was arrested by the police commissioner, by virtue of the Governor's warrant, and on the same day the writ of habeas corpus was served. The attorney who represented the accused before the Governor swears that he informed the Governor that a writ of habeas corpus had been allowed by the United States District Court. A second writ of habeas corpus, to test the validity of the Governor's warrant, was allowed by the District Court on August 29th, and was served on that day. After the production of the accused the hearing was adjourned until September 3d. The Police Commissioner made return to the writ that he held the accused by virtue of the Governor's warrant. On September 16, 1902, the District Court discharged both writs and remanded the accused to the custody of the police commissioner. In his opinion the District Judge says: "Exactly what occurred at the hearing before the Governor is not before me, as the return to the writ does not set forth the proceedings, but enough appears in the petitioner's papers to show that the Governor was proceeding with a due regard to the rights of the accused." The originals of the papers used before the Governor are not now before the court, but papers which are sworn to be copies by the attorney who represented the accused are set forth in the record. It appears that at least one witness was examined before the Governor, but no authentic report of the testimony or the proceedings appears in the record.

Max J. Kohler, for appellant.

Robert S. Johnstone, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The question of jurisdiction, though discussed to some extent in the briefs,

need not be considered, for the reason that it was conceded at the argument that the District Court had full jurisdiction in the premises. It is also unnecessary to consider the legality of the magistrate's commitment for the reasons stated in the appellant's brief as follows:

"The first commitment, by Magistrate Pool, is spent by its own terms, the 30 days mentioned therein and in the New York Statute (Code Or. Proc. § 830), having expired, and the commitment being by its terms superseded by the Governor's warrant; accordingly, the first writ of habeas corpus and the commitment sought to be reviewed by it, are, it would seem, only material now, in connection with our claim that the Governor's warrant is illegal, null and void, for the reason that it was issued at a time when his hands were stayed, by the pendency of the first habeas corpus proceedings, by reason of the express terms of section 766 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 639]."

The controversy must, therefore, be confined to the second writ allowed August 29th upon the petition filed that day in the District Court, the sole question for consideration being the validity of the Governor's warrant.

Conceding the power of the United States courts to interfere in interstate extradition proceedings, it is a power which should be exercised with the utmost caution and only in cases of urgency where the error is plain and the necessity for federal intervention obvious. *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; *Ex parte Brown* (D. C.) 28 Fed. 653; *In re Huse*, 79 Fed. 305, 25 C. C. A. 7, and cases cited.

It was only necessary, as a condition precedent to the issuing of the Governor's warrant, to establish two propositions, first, that the appellant was substantially charged with crime against the laws of Ohio, and, second, that he was a fugitive from the justice of that state; the first is a question of law, the second is a question of fact. *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657.

The principal criticism of the papers certified to the Governor is that no indictment was included among them and that a verified complaint or affidavit before a committing magistrate of Ohio was insufficient to confer jurisdiction upon the Governor, for the reason that an accused person cannot in this manner be charged with an infamous crime. This contention seems to be sufficiently answered by the statute, which, in language as plain as it was possible for the lawmakers to adopt, expressly provides that the demanded person may be charged with crime either in an indictment "or an affidavit."

Section 5278 of the Revised Statutes [U. S. Comp. St. 1901, p. 3597] is as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory, to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime," etc.

That an indictment is the best evidence to prove that a person has been charged with crime is, of course, conceded, but Congress recog-

nized the fact that exigencies frequently arise where it is impossible to procure an indictment in time to prevent the escape of the offender, and hence provided the alternative method of procedure.

If the statute had said that an indictment was an indispensable prerequisite in all cases of treason or felony and that the use of an affidavit must be confined solely to crimes not infamous, there would be force in the appellant's contention. But the statute does not so provide and the argument by which it is sought to sustain the contention that it does, is too attenuated and refined to commend itself to the judgment of the court.

The case of *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386, relied on by appellant, arose under a different statute and has little application to the present controversy.

The precise point now urged seems never to have been decided or even considered, which, in view of the innumerable times the statute has been under review, is somewhat significant.

That the charge can properly be made by affidavit appears to have been assumed and the courts have uniformly construed the statute according to its plain purpose and intent. Thus in *Ex parte Reggel*, 114 U. S. 643, 5 Sup. Ct. 1148, 29 L. Ed. 250, the defendant was charged, by indictment it is true, with the same crime as the appellant—obtaining goods by false pretenses—and the court, at page 649, 114 U. S., page 1152, 5 Sup. Ct., 29 L. Ed. 250, says:

"Under the act of Congress, it became the duty of the Governor of Utah to cause the arrest of Reggel, and his delivery to the agent appointed to receive him, when it appeared: 1. That the demand by the executive authority of Pennsylvania was accompanied by a copy of an indictment, or affidavit made before a magistrate, charging Reggel with having committed treason, felony, or other crime within that state, and certified as authentic by her Governor. 2. That the person demanded was a fugitive from justice."

See, also, *In re White*, 55 Fed. 55, 5 C. C. A. 29; *Kingsbury's Case*, 106 Mass. 223; 2 Moore on Extradition, § 546.

We think the papers presented to the Governor state an offense against the laws of Ohio. The affidavit is open to criticism in several particulars, but there can be no doubt that it fairly informs the accused of the nature of the charge against him. Technical precision is not required in a proceeding before a committing magistrate.

The Ohio statute provides that any person who obtains from another anything of value, by any false pretense, with intent to defraud shall be guilty of an offense which, if the value of the property be \$35 or more, is punishable by imprisonment. It is only important to inquire whether a crime is charged under the statute as construed by the Ohio courts. *Kentucky v. Dennison*, 65 U. S. 66, 16 L. Ed. 717.

The requisites of an indictment under the statute have been stated by the Ohio courts and we think the papers presented to the Governor were sufficient within the rules there enunciated. *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291; *Schleisinger v. State*, 11 Ohio St. 669.

The affidavit charges that the accused did, on May 25, 1902, in Mahoning county, Ohio, unlawfully and falsely pretend to the North American Watch Company of Mansfield, Ohio, with intent to defraud said company, that he was the owner and proprietor of a dry

goods store in Youngstown, Ohio, which statement was false and known by accused to be false; that by means of the said false statement he obtained from the watch company jewelry worth \$400. This was sufficient under the laws of Ohio.

A writ of habeas corpus does not enable the court granting it, or the appellate court, to review disputed questions of fact; it cannot be used as a substitute for a writ of error. *Sternaman v. Peck*, 80 Fed. 883, 26 C. C. A. 214. The court is not, therefore, at liberty to enter upon an investigation of the motives of the complaining witness or to decide what testimony the Governor should have received and considered. None of these questions are now open for review.

That the appellant was a fugitive from justice is manifest. To establish this proposition it was only necessary to show that he committed a crime in Ohio and when sought to be subjected to the criminal process of that state, he was found in New York.

There was testimony that the appellant was at Youngstown on the day that the false statement is alleged to have been made by him and he has not denied that he was there. The Governor had ample evidence to sustain the finding of fact that the appellant was a fugitive from justice and that finding is not open to review.

The last contention of the appellant, which we deem it important to consider, is that the Governor's writ is void because in violation of section 766 of the Revised Statutes [U. S. Comp. St. 1901, p. 597], which is as follows:

"Sec. 766. Pending the proceedings or appeal in the cases mentioned in the three preceding sections and until final judgment therein, and after final judgment of discharge, any proceeding against a person so imprisoned or confined or restrained of his liberty, in any state court or by or under the authority of any state for any matter so heard and determined, or in process of being heard and determined under such writ of habeas corpus, shall be deemed null and void."

As before stated the first writ of habeas corpus was allowed by the District Court on August 22d. It was designed to test the validity of the temporary commitment by Magistrate Pool. It was not served until the 23d of August, the day after the warrant of the Governor had issued. It is argued that because the writ had been allowed before the warrant was signed the latter was rendered nugatory and void.

The arrest by the magistrate was made pursuant to sections 828, 829 and 830 of the New York Code of Criminal Procedure, which provide for the preliminary apprehension of a fugitive from justice and his commitment for a period not exceeding thirty days to enable requisition to be made. It is a wise provision to prevent the escape of criminals pending the arrival of extradition papers from distant states.

The proceeding before the Governor was to determine whether the accused should be delivered to the Ohio authorities. The proceeding before Magistrate Pool was to determine whether sufficient appeared to warrant the detention of the accused to await the Governor's action. The two proceedings were as dissimilar as the hearings before a committing magistrate and before a grand jury. A dis-

charge by a magistrate does not preclude a subsequent investigation by a grand jury and it is not contended that a discharge by Magistrate Pool, for any reason, would have prevented the Governor from granting the requisition.

If nothing heard or determined by the magistrate could act as a bar to the proceeding before the Governor it is not easy to perceive how that proceeding can be regarded as in process of being heard and determined by the allowance of a writ the sole object of which was to test the validity of the magistrate's preliminary commitment. The construction contended for would, in many instances, render nugatory the extradition laws and would lead to the most unfortunate complications. If a discharge should be granted by the District Court in a case like the one at bar the Governor would be forever prevented from acting. If the hearing before the District Court should, for any reason, be postponed beyond the thirty day limit the accused could deliberately leave the prison and the state, and the Governor, and all other state officials, would be powerless to prevent it. Congress could not have intended that section 766 should be invoked to produce such untoward results. The purpose of the section is plain; it is to prevent the state authorities from doing an act which has been, or may be in a pending proceeding, declared unlawful by the federal courts. *Jugiro v. Brush*, 140 U. S. 291, 295, 11 Sup. Ct. 770, 35 L. Ed. 510; *McKane v. Durston*, 153 U. S. 684, 14 Sup. Ct. 913, 38 L. Ed. 867.

No court, so far as we have been able to investigate, has extended the provisions of the section so as to render nugatory the action of the executive authority of a state in circumstances similar to those disclosed by this record.

We are of the opinion that the authority of the Governor to order the extradition of the accused was not in process of being heard and determined under the first writ of habeas corpus allowed by the District Court.

The order is affirmed.

NOTE.

Fugitives from Justice under Extradition Laws.

I. IN GENERAL.

[a] One who goes into a state, commits a crime, and then returns home, is as much a fugitive from justice, as if he had committed the crime in the state of which he was a resident, and had then fled to another state.

—(U. S. 1885) *In re Roberts* (D. C.) 24 Fed. 132, judgment affirmed *Roberts v. Reilly* (1885) 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544;

(Mass. 1870) *In re Kingsbury*, 106 Mass. 223;

(S. C. 1880) *Ex parte Swearingen*, 13 S. C. 74.

[b] (U. S. 1903) One who comes into a state on business for a single day, eight days after the alleged commission of a crime therein, and months before an indictment is found against him for such offense, does not by his departure from the state after the conclusion of his business, become a "fugitive from justice" within the meaning of Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled. Judgment, *People v. Hyatt* (1902) 64 N. E. 825, 172 N. Y. 176, affirmed.—*Hyatt v. People of State of New York*, 23 S. Ct. 456, 188 U. S. 691, 47 L. Ed. 657.

[c] (U. S. 1799) The twenty-seventh article of the treaty of 1794 (8 Stat. 116) between the United States and Great Britain, which provides for the reciprocal extradition of fugitives charged with the crimes of murder and forgery, is not in contravention of the Constitution of the United States, as violating the right of trial by jury; and it applies to citizens of the United States who have committed those crimes within the jurisdiction of Great Britain, and have afterwards come hither, as well as to foreigners.—United States v. Robins, Fed. Cas. No. 16,175.

[d] (U. S. 1851) Where a Swedish seaman deserted in a port of the United States, and afterwards voluntarily returned to his country, thus placing himself under the control of his own government, that government, by a subsequent official act, authorizing him to emigrate to the United States, is precluded from demanding his surrender as a deserter, under the provisions of Treaty 1827, art. 14 (8 Stat. 352).—In re Pederson, Fed. Cas. No. 10,899a.

[e] (U. S. 1874) A person who has committed a crime abroad, and come to the United States before the making of an extradition treaty covering a surrender for such crime, has not thereby acquired a right of asylum of which he cannot be deprived.—In re De Giacomo, Fed. Cas. No. 3,747 [12 Blatchf. 391].

[f] (U. S. 1888) Under Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], providing that "whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory charging the person demanded with having committed treason, felony, or other crime certified as authoritative by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured," etc., the person charged must be a fugitive from the state in which the crime was committed, before the executive authority can be called into action; and one delivered up on a requisition based on a false affidavit that he is a fugitive will be released on habeas corpus.—State of Tennessee v. Jackson (D. C.) 36 Fed. 258, 1 L. R. A. 370.

[g] (U. S. 1888) Though a resident of the state where found, if defendant is accused of a crime in another state, of which he has never been a resident, he may be extradited.—In re Keller (D. C.) 36 Fed. 681.

[h] (Cal. 1876) Where a party has been arrested both under criminal process as a fugitive from justice from another state and in a civil suit, the rights of the plaintiff in such suit must give way to the interest of the people, and the fugitive be surrendered to the authorities of such other state.—Ex parte Rosenblatt, 51 Cal. 285.

[i] (Conn. 1896) A prisoner allowed to go outside a New York reformatory on parol, as allowed by statute of that state, on his promise to obey the directions contained in the parole, which, among other things, directed that he go to Michigan, who, instead of doing so, comes to Connecticut, is a "fugitive from justice," within the provision for extradition of Const. U. S. art. 4, § 2.—Drinkall v. Spiegel, 36 A. 830, 68 Conn. 441, 36 L. R. A. 486.

[j] (Ind. T. 1902) In an application for habeas corpus to secure petitioner's release from custody under an extradition requisition, evidence *held* sufficient to justify a finding that petitioner was a fugitive from the demanding state.—Ex parte Dickson, 69 S. W. 943.

[k] (Kan. 1897) Where a citizen of one state commits a crime in another state, and then return home, there is a "fleeing from justice."—Hess v. Grimes, 48 Pac. 596, 5 Kan. App. 763.

[l] (Kan. 1897) A fugitive from the justice of Kansas, residing in another state, for whose arrest an officer has no other authority than a warrant issued by a justice of the peace of Kansas, and who is informed by such officer of his lack of authority, but who, at the officer's instigation, waives the necessity of requisition papers, and submits to arrest upon the justice's warrant, and is brought by the officer back to Kansas, will be *held* to have voluntarily come within the jurisdiction of the court, and may, immediately upon his arrival, be prosecuted for another offense than the one described in the warrant.—State v. McNaspy, 50 Pac. 895, 58 Kan. 691, 38 L. R. A. 756.

[m] (N. J. 1867) When a person infringes the criminal laws of a state, and departs therefrom without waiting to abide the consequences of his act, he is a fugitive from justice.—*In re Voorhees*, 32 N. J. Law (3 Vroom) 141.

[n] (N. Y. 1879) The fact that a person has committed a crime in another state and has been found in this state sufficiently establishes, for extradition purposes, that he is a fugitive from justice.—*People v. Pinkerton*, 17 Hun, 199.

[o] (N. Y. 1889) Const. U. S. art. 4, § 2, subd. 2, providing that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall * * * be delivered up to be removed to the state having jurisdiction of the crime," authorizes the extradition of a person who escapes after conviction.—*In re Hope* (Ex. Ch.) 10 N. Y. Supp. 28, 7 N. Y. Cr. R. 406.

[p] (N. C. 1894) In the absence of a statute requiring him to do so, the Governor has no authority to surrender, upon requisition of another state, a person who is charged with crime therein, but who has not fled from justice, within the meaning of Const. U. S. art. 4, § 2, cl. 2.—*State v. Hall*, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289.

[q] (Ohio, 1879) A person who was within a state where and when a crime was committed with which he is charged, and afterwards departs therefrom to another, is none the less a fugitive from the justice of the state, within the meaning of the federal Constitution and acts of Congress relating to extradition, because he returned to his permanent home.—*Johnson v. Ammons*, 6 Ohio Dec. 747, 7 Am. Law Rec. 662.

[r] (Pa. 1813) One who steals goods in another state and brings them into Pennsylvania is a fugitive from justice.—*Simmons v. Commonwealth*, 5 Bin. 617.

[s] (S. D. 1900) Where one sought to be extradited for an offense involving fraud left the state where it was alleged to have been committed, not only with the knowledge, but at the special request, of the parties alleged to have been defrauded, he is not a fugitive from justice, within the meaning of the federal Constitution and the extradition act.—*In re Tod*, 81 N. W. 637, 12 S. D. 386, 47 L. R. A. 566, 76 Am. St. Rep. 616.

[t] (Wash. 1899) Convicted prisoners in the custody of an officer, en route to the penitentiary, are not fugitives from justice in another state through which it was necessary to take them, requiring extradition proceedings in that state in order to hold them, under Const. U. S. art. 4, § 2, providing that a person charged with crime, who shall flee from justice, and be found in another state, shall be delivered upon demand of the executive of the state from which he fled.—*In re Maney*, 55 Pac. 930, 20 Wash. 509, 72 Am. St. Rep. 130.

II. ACTUAL PRESENCE OF ACCUSED IN DEMANDING STATE WHEN CRIME WAS COMMITTED.

[a] (U. S. 1903) One who was not within a state when the crime of larceny or false pretense was, if ever, committed therein, cannot be deemed a "fugitive from justice," within the meaning of Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled. Judgment, *People v. Hyatt* (1902) 64 N. E. 825, 172 N. Y. 176, affirmed.—*Hyatt v. People of State of New York*, 23 S. Ct. 456, 188 U. S. 691, 47 L. Ed. 657.

[b] (U. S.) Where a person was only constructively present in a state demanding his extradition at the time of the commission of the alleged crime, it is not sufficient to render him a fugitive from justice and extraditable, his actual presence being required. Order (Sup. 1902) 76 N. Y. Supp. 1026, reversed.—(1902) *People v. Hyatt*, 64 N. E. 825, 172 N. Y. 176, judgment affirmed *Hyatt v. People* (1903) 23 Sup. Ct. 456, 188 U. S. 691, 47 L. Ed. 657.

[c] (U. S.) The extradition of one who was not present in the state demanding his surrender at the time of the commission of the alleged crime of larceny and false pretenses will not be granted because he was present in said state for a single day nearly a year before the institution of any prosecution against him. Order (Sup. 1902) 76 N. Y. Supp. 1026, reversed.—(1902) *People v. Hyatt*, 64 N. E. 825, 172 N. Y. 176, judgment affirmed *Hyatt v. People* (1903) 23 Sup. Ct. 456, 188 U. S. 691, 47 L. Ed. 657.

[d] (U. S.) As each state has the power to punish crimes committed within its borders, the doctrine requiring the corporeal presence of one accused of a crime within the state at the time of its commission, in order to render him a fugitive from justice and extraditable, will not render the several states asylums for criminals inflicting injury upon persons or property within the state, though not actually present therein. Order (Sup. 1902) 76 N. Y. Supp. 1026, reversed.—(1902) *People v. Hyatt*, 64 N. E. 825, 172 N. Y. 176, judgment affirmed *Hyatt v. People* (1903) 23 Sup. Ct. 456, 188 U. S. 691, 47 L. Ed. 657.

[e] (U. S. 1873) A subject of the King of Prussia, charged with having committed a crime in Belgium, is extraditable under the treaty with Prussia of June 16, 1852, as for a crime "committed within the jurisdiction" of Prussia, where such person is punishable for such crime in Prussia, where a prosecution therefor has been commenced.—In *re Stupp*, Fed. Cas. No. 13,562 [11 Blatchf. 124].

[f] (U. S. 1892) Where a person starts a bank, in which he is an officer, and the business of which is under his control, and afterwards goes to another state, and allows the bank, while to his knowledge in an insolvent condition, to receive a deposit, in violation of the law of the state, he is guilty of the offense, though not in the state at the time of the deposit or afterwards, and is a fugitive from the justice of that state, within the acts of Congress relating to interstate extradition.—In *re Cook* (C. C.) 49 Fed. 833, judgment affirmed *Cook v. Hart* (1892) 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934.

[g] (Ala. 1883) A person arrested as a fugitive from justice on a warrant issued by the Governor of Alabama in pursuance of a requisition by the Governor of Pennsylvania, based on an indictment found in that state, for false pretenses, may show, on habeas corpus, that he was not in the state of Pennsylvania at the time the offense is alleged to have been committed, and has never been there since; that the goods in question were obtained by purchase from an agent of the prosecutor in the state of New York; to whom the false representations, if any, were made; and that he has never fled from the state of Pennsylvania, and was therefore not a fugitive from justice.—In *re Mohr*, 73 Ala. 503, 49 Am. Rep. 63.

[h] (Ala. 1883) Const. U. S. art. 4, § 2, and Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], relative to the extradition of fugitives from justice, provide only for the extradition of persons who have fled from the state in which the crime was actually, not merely constructively, committed.—In *re Mohr*, 73 Ala. 503, 49 Am. Rep. 63.

[i] (Ala. 1883) One who constructively commits a crime in a state, but has never been corporally within its bounds, is not a fugitive from justice.—In *re Mohr*, 73 Ala. 503.

[j] (D. C. 1903) While the actual presence of the accused in the demanding state, at the time of the commission of the crime as charged in the indictment, is an essential condition of extradition, the warrant of the Governor thereof is prima facie evidence that the accused is a fugitive from justice, whether the writ so recites or not, and is sufficient to justify the removal of the accused, unless he overcomes the presumption so created by conclusive evidence.—*Hayes v. Palmer*, 21 App. D. C. 450.

[k] (Iowa, 1878) A citizen and resident of Iowa, who is charged with having been constructively guilty of an offense in another state, upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice, within the meaning of the United States Constitution.—*Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116.

[l] (Ky. 1894) Where the person demanded was substantially charged with a crime against the laws of the demanding state, by indictments certified as authenticated by the Governor of the state, but it was shown that the prisoner was not within the bounds of the state at the time he wrongfully received the money which he was charged with, and had not been within the state since that time, he was not a fugitive from justice, and consequently not subject to extradition.—*Ex parte Knowles*, 16 Ky. Law Rep. 263.

[m] (N. C. 1894) A resident of North Carolina, who, while in Pennsylvania, procures, by false representations, a contract for the shipment of goods from that place to his residence, and then returns there, and receives the goods, and is indicted in Pennsylvania for false representations, is a fugitive from justice,

and may be extradited.—*In re Sultan*, 115 N. C. 57, 20 S. E. 375, 44 Am. St. Rep. 433, 28 L. R. A. 294.

[n] (N. C. 1894) One who has not actually been within the territorial limits of a state since the commission of the crime with which he is charged, though it was constructively committed therein, cannot "flee from justice and be found in another state," within Const. U. S. art. 4, § 2, cl. 2, providing that a person so doing shall be surrendered on demand of the state from which he fled.—*State v. Hall*, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289.

[o] (Ohio, 1878) The provisions of the Constitution of the United States (article 4, § 2) and Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], which provide for the extradition of those who shall flee from justice and be found in another state, are confined to persons who are actually and not merely constructively present in the demanding state when they committed the act charged against them.—*Nolze v. Wilcox* (Com. Pl.) 4 Ohio Dec. 125, 3 Wkly. Law Bul. 192, affirmed *Wilcox v. Nolze* (1878) 34 Ohio St. 520.

[p] (Pa. 1887) A fugitive from justice does not embrace one who, while in one state and remaining there, commits acts which result in a crime by the laws of another state.—*Commonwealth v. Trach*, 3 Pa. Co. Ct. R. 65.

III. INTENT TO AVOID PROSECUTION.

[a] To be a fugitive from justice, in the sense of the act of Congress regulating the subject of extradition (Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597]), it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against its laws, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another state.

—(U. S. 1885) *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, affirming judgment in *re Roberts* (D. C. 1885) 24 Fed. 132; (1886) *Ex parte Brown* (D. C.) 28 Fed. 653;

(Minn. 1887) *State v. Richter*, 37 Minn. 436, 35 N. W. 9.

[b] (U. S. 1893) Under Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], providing for interstate extradition, a person is a fugitive from justice when he has committed a crime within a state, and withdraws from the jurisdiction of its courts without waiting to abide the consequences, and it matters not that some other cause than a desire "to flee" induced such withdrawal.—*In re White*, 55 Fed. 54, 5 C. C. A. 29, 14 U. S. App. 87.

[c] (U. S. 1898) Where one has left the state in which he is indicted for a crime, he is a fugitive from justice, in the sense of the act of Congress relating to the extradition of criminals, whatever may have been his motive in leaving the state.—*In re Bloch*, 87 Fed. 981.

[d] (Ind. 1850) To give a magistrate jurisdiction under the act of the Legislature, approved February 12, 1838 (Rev. St. 1843), relative to fugitives from justice, it should be shown that the person sought to be arrested has left the state in which he committed the crime, for the purpose of escaping punishment for it.—*Degant v. Michael*, 2 Ind. (2 Cart.) 396.

[e] (Ind. T. 1902) To be a fugitive from justice, in the sense of the act of Congress regulating extradition, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime, he has left its jurisdiction, and is found within the territory of another when it is sought to subject him to criminal process.—*Ex parte Dickson*, 69 S. W. 943.

[f, g] (Ohio, 1879) To constitute a fugitive from the justice of a state, within the meaning of the federal Constitution and acts providing for extradition, the fugitive need not have fled secretly or suddenly, with a consciousness of having committed the offense, or hurriedly, to avoid apprehended process of law. It is sufficient if he was within the jurisdiction of the state when the offense was alleged to have been committed, and departed before a reasonable opportunity to prosecute him after the facts were known.—*Johnson v. Ammons*, 6 Ohio Dec. 747, 7 Am. Law Rec. 662, 4 Wkly. Law Bul. 189.

IV. PRESUMPTIONS ARISING FROM ISSUANCE OF WARRANT BY GOVERNOR OF STATE ON WHICH DEMAND IS MADE.

[a] (U. S. 1892) In interstate extradition, the warrant of the executive of the state on which demand is made is *prima facie* evidence of the flight of the accused from the demanding state, if unassailed before his delivery to the demanding state, and the surrender is lawful; and upon such surrender the warrant ceases to be of force, and the accused is then held in lawful custody under process of the demanding state, and cannot thereafter assert that he was not a fugitive from justice.—*In re Cook* (C. C.) 49 Fed. 833, judgment affirmed *Cook v. Hart* (1892) 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934.

[b] (U. S. 1892) In interstate extradition, the warrant of the executive of the state in which the accused is found is not conclusive of the fact that he is a fugitive from justice, and the federal courts may, upon habeas corpus, inquire into and determine the fact of flight at any time before the actual surrender of the accused to the demanding state.—*In re Cook* (C. C.) 49 Fed. 833, judgment affirmed *Cook v. Hart* (1892) 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934.

[c] (U. S. 1879) Where it appears from the recitals in the warrant that the Governor had before him a duly authenticated copy of an indictment for an offense which, if committed, necessarily implies the presence of the prisoner at the time and place of the offense, and no evidence is offered that he is not a fugitive from justice, he is properly held under the warrant.—*In re Leary*, Fed. Cas. No. 8,162 [10 Ben. 197].

[d] (U. S. 1898) The action of the Governor of a state in issuing a warrant for the surrender of an alleged fugitive from justice to the authorities of another state upon a requisition from the Governor of such state is presumptive proof that the person named was in fact a fugitive from the justice of the state making the requisition.—*Eaton v. State of West Virginia*, 91 Fed. 760, 34 C. C. A. 68.

(127 Fed. 554.)

THE MANITOU.

(Circuit Court of Appeals, Second Circuit. December 11, 1903.)

No. 41.

1. SHIPPING—DAMAGE TO CARGO—UNSEAWORTHINESS.

In a suit against a steamship to recover for damage to cargo during a voyage from London to New York, caused by the escape of steam through partially open valves, the finding of the trial court that the evidence on behalf of the claimant was insufficient to show that the valves were closed when the steamer sailed affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court (116 Fed. 60), by which the steamer *Manitou* was compelled to pay for cargo damaged by steam which entered cargo compartments through pipes of the fire-extinguishing apparatus.

J. Parker Kirlin, for appellant.

W. Mynderse, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We do not think it necessary to add anything to the opinion of the District Judge, concurring with him in the conclu-

¶ 1. Implied warranty of seaworthiness, see note to *The Carib Prince*, 15 C. C. A. 388.

sion that the claimant has not satisfactorily shown that the valves through which the steam made its way were closed when the steamer sailed. The damages have been calculated in accordance with the rule laid down by this court in *The Styria*, 101 Fed. 728, 41 C. C. A. 639. We see no reason to modify the views therein expressed.

The decree is affirmed, with interest and costs.

(128 Fed. 925.)

UNITED BLUE-FLAME OIL STOVE CO. v. SILVER & CO. et al.

(Circuit Court of Appeals, Second Circuit. January 6, 1904.)

No. 68.

1. PATENTS—PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

An order granting a preliminary injunction against infringement, or requiring the defendant in the alternative to give a bond, where such bond has been given, so that defendant's business is not disturbed, will not be reviewed on the merits on appeal in advance of the hearing on full proofs.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from an order of the Circuit Court, Eastern District of New York. The suit is the ordinary one for infringement of patent. Complainant moved upon affidavits for an injunction pendente lite. The order appealed from directs that injunction issue against defendants until further order of the court, restraining them from making, etc., oil burners constructed as described in the patents sued upon: "provided, however, such injunction shall not issue in case the defendants file a bond for \$10,000, with satisfactory sureties, within ten days from date hereof, to secure complainant in that amount for future damages upon final decree which may hereafter be awarded against them."

Stephen J. Cox, for appellants.

A. S. Pattison, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Upon the record presented it is not altogether clear that complainant was entitled, in advance of final hearing, to an injunction immediately stopping manufacture and sale of the devices complained of. The order below has not interfered with such manufacture and sale, but has only required defendant to give security to respond, in the event of complainant's ultimate success, for whatever interim damages may accrue. Such security has been given, and defendant's business remains undisturbed. We do not feel disposed to modify such order, nor to discuss the issues pre-

¶1. Review of interlocutory decrees granting or continuing injunctions in patent cases in Circuit Court of Appeals, see notes to *Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co.*, 3 C. C. A. 572; *Southern Pac. Co. v. Earl*, 27 C. C. A. 189; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 484.

See *Patents*, vol. 38, Cent. Dig. § 606.

sented here on ex parte affidavits in an opinion which might constrain the judge to whom at final hearing the same issues may be differently presented.

The order of the Circuit Court is therefore affirmed, with costs.

(128 Fed. 369.)

GASTONIA COTTON MFG. CO. v. W. L. WELLS CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

No. 469.

1. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—WANT OF LEGAL INCORPORATION OF PLAINTIFF.

An application for a charter for a corporation was made to the Governor of Mississippi in accordance with the laws of the state, and the proposed charter submitted was approved by him. The state statute provides that "the powers therein specified shall by the approval of the charter be vested in such corporation and it shall go into operation at the time and on the terms and conditions specified." The charter in question provided that the corporation should have power to commence business as soon as \$2,000 of its capital stock had been "subscribed and paid for." The three corporators met, and subscribed for that amount of stock, elected themselves directors and officers, and commenced and thereafter carried on business in the corporate name, but neither then nor thereafter was any capital stock paid in, or certificates of stock issued; the business being carried on by the individuals, who drew money out as though it belonged to them individually, without any reference to the corporation, or to the contracts or obligations entered into in its name. *Held*, that the corporation never acquired a legal existence, and could not maintain an action in a federal court against a corporation of another state on the ground that it was a citizen of Mississippi.

2. SAME.

A corporation must have been lawfully created under the laws of a state, to give a federal court jurisdiction of an action brought in its name on the ground of its citizenship in such state; the fact that as to certain persons, and in certain transactions, it may be a corporation *de facto*, is not sufficient.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

For opinion below, see 118 Fed. 190.

Charles Price and Armistead Burwell, for plaintiff in error.

Murray F. Smith and Charles W. Tillett, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and McDOWELL, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the Circuit Court of the United States for the Western District of North Carolina. The action was brought in the court below in the name of the W. L. Wells Company against the Gastonia Cotton Manu-

¶1. Citizenship of corporations for purpose of federal jurisdiction, see notes to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.

facturing Company on a money demand for \$35,967.60. The complaint, in its first paragraph, setting out the jurisdiction of the court, alleges that the plaintiff is a corporation created and duly organized under the laws of the state of Mississippi, and is a citizen and resident of the state of Mississippi, and the defendant is a corporation under the laws of North Carolina. The defendant, in the first paragraph of its answer, admits its own corporate character under the laws of North Carolina, but adds:

"It has no knowledge or information sufficient to found a belief as to the truth of the allegation contained in the first section of the complaint, to wit, that the plaintiff is a corporation organized under the laws of the state of Mississippi, and a citizen and resident of that state, and therefore it denies the said allegation."

This is strictly in accordance with code pleading and practice which prevails in North Carolina. Under this system of pleading, there are two modes of defense to a complaint, demurrer, and answer. So this defense set up here, which ordinarily would be made by plea in abatement, is properly made in the answer. Code Proc. N. C. § 240. So, when the case was heard before the jury, the court below, in formulating the issues, put as the first two these: "(1) Is plaintiff a corporation, as alleged in the complaint? (2) Is plaintiff a citizen of the state of Mississippi?" These issues are practically one and the same. Having formulated the issues, the court directed the jury to find them in the affirmative. The issues presented, as will be seen hereafter, were both issues of law. The jury having found for the plaintiff on all the issues under instructions, a writ of error was allowed, and the case is here on assignments of error. The first five go to the instructions of the court on the first and second issues. The burden of proof on these issues being on the plaintiff below, these facts appeared:

W. L. Wells was dealing in cotton in the state of Mississippi, and conducted a large business—among others, with the defendant below. In 1898 a charter was applied for by him, John T. Wells, and George Butterworth for an incorporation under the name of the W. L. Wells Company. Charters in Mississippi are granted under general laws. An application is made to the Governor for a charter. He refers the proposed charter to the Attorney General, and, upon his certificate that it is not violative of the Constitution and laws of Mississippi, the Governor approves it, and causes the great seal to be affixed to it. In the present case the following form of charter was submitted to the Governor of Mississippi, and by him referred to the Attorney General 26th April, 1898:

"Section 1. Be it known and remembered that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract, and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

"Sec. 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed, and paid for, said corporation shall have power to commence business.

"Sec. 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton fac-

torage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and, generally, may have all powers conferred by Chapter 25 of the Annotated Code of 1892, necessary and requisite to carry out the purpose of said corporation.

"Sec. 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

"The foregoing proposed charter of incorporation is respectfully referred to the Honorable Attorney General for his advice as to the constitutionality and legality of the provisions thereof.

A. J. McLaurin, Governor.

"Jackson, Miss., April 26th, 1898.

"The provisions of the foregoing proposed charter of incorporation are not violative of the Constitution or laws of the state.

Wiley N. Nash,

"Attorney General.

"Jackson, Miss., April —, 1898.

"Executive office [state coat of arms], Jackson, Mississippi.

"The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

"[Great seal of the state of Mississippi.]

In testimony whereof, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed this 1st day of June, 1898.

"By the Governor: A. J. McLaurin.

"J. L. Power, Secretary of State.

"Office of Secretary of State, Jackson, Mississippi.

"I, J. L. Power, Secretary of State, do certify that the charter hereto attached, incorporating the W. L. Wells Company, was, pursuant to the provisions of chapter 25 of the Annotated Code, 1892, recorded in the book of incorporations in this office.

"[Great Seal of the State of Mississippi.]

Given under my hand the Great Seal of Mississippi hereunto affixed this 1st day of June, 1898.

"J. L. Power,

"Secretary of State."

The Attorney General gave his certificate in favor of the constitutionality of the proposed charter on the — day of April, 1898, and on the 1st day of June, 1898, the Governor caused the great seal of the state to be put to the charter. The act under which the Governor approved this charter declares:

"The powers therein specified shall by the approval of the charter be vested in such corporation and it shall go into operation at the time and on the terms and conditions specified."

It will be noted that the second section of this charter fixed the terms and mode in which it would get life—could act as a corporation:

"The capital stock of said corporation shall be \$50,000, divided into shares of \$500, each, and as soon as \$10,000 of said stock is subscribed and paid for, said corporation shall have power to do business."

The Governor having sealed the charter, the incorporators met on 18th July, 1898, and read over and adopted it. Books of subscription were then opened, and W. L. Wells subscribed for ten shares, John T. Wells for five shares, and George Butterworth for five shares. On the same day and at the same place a stockholders' meeting was held, and W. L. Wells, John T. Wells, and George Butterworth were elected directors. The meeting thereupon adjourned, and the record does not disclose whether they ever met again or not. John T. Wells, who was

secretary and treasurer of the company, says that, when the stock was subscribed for, nothing was paid; that he paid for the stock out of the profits of the first year, so did Butterworth, and so did W. L. Wells. Yet he says that these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder, no stock certificates ever issued. He goes on to say that he never paid any cash into the Wells Company, nor did Butterworth, nor did W. L. Wells, and that there was absolutely no capital to start with; that, notwithstanding, he drew out \$10,217.55, and Butterworth took \$9,022.65—both he and Butterworth being men of small means, having no property liable for their debts. It is very clear from this that, having a charter like this, conditioned upon the payment of \$10,000 in subscriptions, then these men undertook to exercise powers in the charter without fulfilling or attempting to fulfill the conditions precedent in the charter; that, even when they had made money in the business, they ignored the corporation altogether, and drew the money out of the business as if it belonged to them, and not to the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this, these assumed corporators went on in business, and contracted obligations in the name of the so-called corporation, which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal responsibility. At the same time, two of them were, in a business sense, irresponsible. It would seem that this transaction was an abuse of, and in fraud of, the law, and that the Wells Company had never, and could not have, any legal existence. When a corporation is formed under an enabling act, all the mandatory provisions of the statute must be complied with. In *Beach on Private Corporations*, § 12, p. 18, we find:

"There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made requisite to the assumption of corporate powers. In respect to the former, any material omissions will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question."

The same learned author, at page 27, says:

"It is immaterial that the persons attempting incorporation have acted in good faith, and have actually carried on business under their supposed authority to act as a body corporate."

This seems to be in accordance with the law in Mississippi. In *Perkins v. Sanders*, 56 Miss. 733, the Supreme Court of that state says:

"In charters, which are mere propositions for the organization of a corporation, and which require certain acts to be performed precedent to the existence of the corporation, no corporation can exist, and, of course, no corporate act can be performed, till these conditions have been complied with. In all such cases, when a certain amount is named in the charter as necessary to be subscribed as the capital stock [in the case at bar it must be subscribed and paid in], such subscription [and, of course, such payment] is regarded as a condition precedent to the existence of the corporation, unless otherwise provided in the charter."

Discussing the broad distinction between a charter which creates a corporation, and invests it at once with corporate powers, and that class of corporations created under general laws requiring an application for a charter, the same court says:

"The distinction between the two classes of charters is thus seen to be that in the first class the charter is a mere provision on the part of the Legislature for the formation of a corporation upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until these conditions have been performed, except such as may be expressly permitted by the charter, and as to those acts it would be considered that the corporation had existence before its full investiture with its corporate franchise."

It is contended, however, that the plaintiff, if it be not a corporation *de jure*, is a corporation *de facto*, and will be so recognized; that, at least, the defendant, having dealt with it as a corporation, is now estopped from denying its existence as a corporation. It must be borne in mind that the question we are now considering is not the relative rights of the plaintiff in error and of the defendant in error. The former may be estopped by its acts. We are dealing with a question of the jurisdiction of this court—a question which the court must always take up, *suo motu*, if necessary; the question being at the threshold of every case before it. *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543. The presumption is always against the jurisdiction of the Circuit Court, unless the contrary affirmatively appears. *Grace v. Am. Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932. Its jurisdiction does not depend upon the consent of parties actually made, or constructively implied by estoppel. The jurisdiction is statutory, and must follow the statute. When a corporation sues in that court, claiming jurisdiction through diversity of citizenship, it can maintain jurisdiction only by showing that it is the creation of the state of which it claims to be a corporation, and that it is really a corporation. Otherwise it is not a legal entity—a person in the eye of the law. "A corporation cannot, for the purpose of jurisdiction in federal courts, be considered a citizen or a resident of a state in which it has not been incorporated." *Southern Pacific Co. v. Denton*, 146 U. S. 203, 13 Sup. Ct. 45, 36 L. Ed. 942. When a complainant comes into the Circuit Court of the United States as a complainant, and seeks to sustain the jurisdiction by virtue of its citizenship, it must establish that right in itself, and show the credentials of its birth and existence. The fact that, as to certain persons, and in certain transactions, it may be a corporation *de facto*, is not enough.

The defendant in error relies with full confidence upon the case of *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773. That was an action brought in the Circuit Court of the United States for the District of California by plaintiff against the Tulare irrigation district, a public municipal corporation of the state of California. This district had issued coupon bonds for the purposes of their work, had floated them in the market, and plaintiff had become a bona fide purchaser for value. The coupons being matured, payment was refused, and this suit was brought. The defense set up was on certain irregularities in forming the corporation. The act under which the corporation was created required that a petition for the

organization of an irrigation district be presented to the supervisors of the county, signed by the required number of freeholders. Before the petition was presented, the act required that it be published in some newspaper at least two weeks before its presentation, "together with a notice stating the time of the meeting at which the same will be presented." In that case the petition was properly prepared and signed. The petition, with the signatures, was published in the proper newspaper, together with the notice, but the signatures attached to the petition were not reproduced after the notice. All of the public signatures and notice were published in the same column, and as one entire proceeding, separated from the rest of the contents of the newspaper by a black line across the column above, and another across the column below, this publication. This was charged as a fatal defect, and the bonds were claimed to be invalid. The opinion of the Supreme Court strikes the keynote of the decision in the opening sentences:

"It is agreed in the statement of facts of this case that the moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and, while acting as a corporation at all times, still sets up that it never was legally organized, and hence had no legal right to issue any bonds."

In the case of *Douglas County Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46, the court said:

"Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by lapse of time, and, we think, applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed."

This idea dominated the decision. It is evident from the opinion that the court thought the defendant a corporation *de jure*. But in the argument, assuming that there were irregularities, the court held that, inasmuch as it attempted to organize under a general law, and it actually used the franchise, and continued to act in every respect as a corporation, it could not deny its corporate existence, so as to defeat its obligations. Indeed, had any other conclusion been reached, a fraud would have been sustained. The distinction between that case and the one at bar is broad and distinct. In the latter case the plaintiff below went into the Circuit Court claiming the jurisdiction because, and only because, it was a corporation resident in a state other than the defendant. It was bound to prove its claim. In doing so, it did not prove a bona fide attempt to fulfill the conditions of its incorporation. On the contrary, there is no evidence whatever of its use of the corporate franchise. It had no certificates of stock, no corporate capital, no declaration of dividends, and, as far as the record discloses, no corporate meeting after the first. Nor, as will be seen hereafter, will the ends of justice be defeated if it be not treated as a corporation.

In *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784, the point now under discussion could not arise, as the jurisdiction was not involved. *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, simply de-

cides that a state, being creator of a municipal corporation, is the proper party to impeach the validity of its creation, and, if the state acquiesces in the validity of a municipal corporation, the corporate existence thereof cannot be collaterally attacked.

It will be noticed that, in all the cases in which suits by or against *de facto* corporations were sustained, the ruling is that the corporate existence cannot be collaterally attacked. In the case before us there is no collateral attack. The plaintiff below itself put that question directly in issue.

In our opinion, the plaintiff below (defendant in error here) failed to establish its first allegation, as to its corporate capacity, and the court below erred in instructing the jury to find the issues in this regard in its favor. This conclusion renders unnecessary any discussion of the other assignments of error.

The conclusion reached will not defeat the ends of justice if the claim of the defendant in error be good. It is competent for the persons claiming to be incorporators to carry on the suit in their own names, and, as they have requisite citizenship, the suit can be maintained in the federal court. *Jones v. Aspen Hardware Co.* (Colo. Sup.) 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220.

It is ordered that the judgment of the Circuit Court be reversed; that this cause be remanded to that court, and, if the plaintiffs below (defendants in error here) be so advised as to continue the suit in that court, that they be allowed to amend their complaint by inserting their individual names as plaintiffs, and that thereupon a new trial be granted; if, however, they decline to do this, that the suit be dismissed without prejudice. Reversed.

(128 Fed. 375.)

MOFFITT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1904.)

No. 951.

1. ALIENS—CONSTRUCTION OF IMMIGRATION LAWS—OFFENSES.

The immigration laws of the United States, in so far as relates to punishment for their violation, are highly penal, and are to be strictly construed, and their provisions applied only to cases clearly within their terms and their spirit, construed as a whole.

2. SAME—NEGLECT OF MASTER TO DETAIN ALIEN ON BOARD HIS VESSEL—IMMIGRANTS DEFINED.

Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," clearly relates to immigration, and applies only to the entry into the United States of immigrants who, according to standard definitions of the term, are persons removing into the country for the purpose of permanent residence, and the penalty imposed by section 10 (26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]) on the master of a vessel for neglecting to detain on his vessel any "alien who may unlawfully come to the United States" on such vessel, or to return him to the port from which he came, must be construed in the light of such general purpose, and limited in its application to cases of alien immigrants.

3. SAME—EVIDENCE CONSIDERED.

Defendant was indicted under Act March 3, 1891, c. 551, § 10, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299], for neglecting to detain on the steamship of which he was master an alien not entitled to land in the United States, by reason of which neglect the alien escaped and landed in the United States. On the trial the following facts were shown by an agreed statement: When defendant's ship was anchored off shore at a Mexican port a number of native peddlers came on board to sell their wares. When one of them came on deck to go ashore he found that the vessel had started and proceeded some distance. Defendant refused his request that he be taken back and landed, but promised to stop and leave him on the return trip, and thereupon put him at work, but without placing him on the crew list. On arriving at San Francisco an immigration officer notified defendant not to land the Mexican without permission, but the latter stated he did not wish to land, but wanted to be taken back home, and he was not confined. Just before the vessel sailed, however, he left it without the consent or knowledge of defendant or any of his officers, and had not returned when she left the port. *Held*, that such facts were not sufficient to warrant defendant's conviction, the alien not being an immigrant within the meaning and intent of the act, whom defendant was required to put in irons or keep under guard to secure his return on the vessel, and there being no evidence or claim that he did not act in good faith.

In Error to the District Court of the United States for the Northern District of California.

The plaintiff in error, master of the British steamship *Tucapel*, was indicted in the District Court for the Northern District of California for an alleged violation of the provisions of section 10, c. 551, Act March 3, 1891, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]. The indictment contained three counts. A demurrer was interposed to this indictment upon the ground that it did not in either count set forth sufficient facts to constitute an offense against the United States. A motion was also made to quash the indictment upon the same ground. This motion was denied. The demurrer was sustained as to the second and third counts, and overruled as to the first count. This count charged the plaintiff in error with having unlawfully neglected at San Francisco, Cal., to detain, on board the *Tucapel*, Rodrego Marquez, an alien not entitled to land, and by reason of such neglect the alien escaped from the vessel and landed in the United States. The defendant entered his plea of not guilty, and the case was tried before the court with a jury, upon the following agreed statement of facts: "(1) Defendant at all the times herein stated was, and now is, master of the British steamship *Tucapel*, belonging to the Pacific Steam Navigation Company, then plying as a common carrier between San Francisco and Mexican and South and Central American ports, on the Pacific Coast. (2) On the morning of the 25th day of June, 1901, the *Tucapel*, carrying passengers, a cargo of freight, and the United States mail, destined for San Francisco and elsewhere, arrived off the port of Mazatlan, Mexico, on her way north, and was anchored at a considerable distance there, off shore. She was thereupon surrounded and boarded by native boatmen and peddlers, who coming out to the vessel in small boats or cascos, according to the practice prevailing at this and other southern ports, came on board the vessel to sell fruits and other wares to passengers and members of the crew. (3) Among these boatmen and peddlers was Rodrego Marquez, a Mexican. (4) After remaining at anchor off Mazatlan for several hours, and completing the transaction of her business there, the vessel proceeded on her journey north, on the afternoon of said day, traveling at her usual rate of speed, of from twelve to fourteen knots an hour. She had proceeded upon her voyage about ten miles, when one of the ship's officers reported to defendant, as master of the said vessel, that Marquez had been by accident overboarded, and was then on board the *Tucapel*. Defendant thereupon interviewed the Mexican, who begged him to stop the vessel, return to Mazatlan, and land him there, inasmuch as he had not noticed while plying his business on the steamer that she was under way until he had returned to her deck, a short time before

his case had been reported to defendant. Marquez protested that he did not wish to be carried to the United States, but defendant declined to accede to his request, and then return to Mazatlan, especially as it was a matter of common occurrence for a native boatman or peddler to be overcarried from one port or place to another on the South Pacific Coast, but he promised Marquez, however, to bring him back to his native place on the return voyage of the steamer, and, without being placed on the crew list, he was set at work shoveling coal as a work-away on the voyage north. (5) The Tucapel arrived at San Francisco, June 30, 1901, with Rodrigo Marquez on board, who then said he did not want to land, but to be returned to Mazatlan as soon as possible. (6) On her arrival at San Francisco the vessel was boarded by an immigration inspector, who notified defendant not to land Marquez until permission therefor had been obtained from the commissioner of immigration at the port last named, said Marquez having no financial means whatsoever at San Francisco. (7) Marquez was not locked up nor placed in irons on board the steamer, and on the night of the 4th of July, 1901, and just before the steamer left San Francisco on her southern route, he left the vessel without the knowledge or permission of defendant, or of any of his officers, or of the officers of the immigration bureau here. (8) Defendant at no time had any intention or wish to land Rodrigo Marquez at this or any other port or place in the United States, and, as far as defendant could learn, said Marquez had at no time any intention of coming to or landing in the United States. (9) The Pacific Steam Navigation Company has withdrawn its steamers from the San Francisco route, and they, including the steamer Tucapel, are now engaged exclusively in plying between ports and places on the South Pacific Coast, as far north as Panama. The steamer sailed from San Francisco for the last time February 10, 1902. The foregoing statement is subject to any objection thereto or to any part thereof by either plaintiff or defendant on the ground that the same is immaterial or irrelevant."

The defendant moved to strike out certain portions of the agreed statement of facts as immaterial and irrelevant, which motion was denied. After the facts agreed upon had been read to the jury, the defendant moved the court to instruct the jury to bring in a verdict for the defendant upon the following grounds: "(1) That the indictment fails to set out that Marquez was an alien immigrant under the act of 1891, under which the indictment was framed, which relates to foreign immigration, and therefore there can be no conviction unless the indictment has set forth that fact. (2) That the indictment fails further to state a cause of action, in that it does not show in what respect this alien, if an immigrant, was a person not lawfully entitled to enter the United States. It does not show in what respect this alien was included, if at all, in one of the interdicted classes. (3) For the reason that the facts as agreed and shown to the jury do not make a case for the government in that, among other reasons, it is not shown that Marquez was an alien immigrant, and it is not shown that he came to this country with the intention of coming here, but was involuntarily carried here."

This motion was denied. The court also declined to give certain instructions asked for by defendant, and gave other instructions to the jury, to all of which the defendant duly excepted. The jury returned a verdict of guilty, and the defendant was sentenced to pay a fine of \$300. From this judgment the defendant brings a writ of error to this court.

There are 10 assignments of error, covering every ruling of the court below, but, as was said by counsel for the plaintiff in error, these assignments may be grouped into three classes, and pertain "(1) to the insufficiency of the first count of the indictment as a statement of the commission by plaintiff in error of an offense against the laws of the United States; (2) to the proper construction of section 10 of the act of March 3, 1891, under which the indictment was framed, which refers to immigrants and no others; and (3) to the insufficiency of the evidence to sustain the verdict."

Page, McCutchen & Knight, for plaintiff in error.

Marshall B. Woodworth, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts as above). If the alien Marquez was not a person permitted by law to enter or remain in the United States, it is manifest that the plaintiff in error did not exercise reasonable diligence, and was clearly guilty of negligence in failing to detain said alien on the vessel. The good intention, or absence of any wrongful intention, on the part of plaintiff in error, would constitute no excuse whatever for his negligence.

The real question presented for our determination is whether or not the agreed statement of facts is sufficient to show that the alien Marquez belonged to one of the classes of persons whose admission into the United States is excluded by the provisions of the act of March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1299]. It will be observed that this act is "An amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor." In some particulars it was amended by "An act to facilitate the enforcement of the immigration and contract labor laws of the United States," approved March 3, 1893 (27 Stat. 569, c. 206 [U. S. Comp. St. 1901, p. 1300]); and again March 3, 1903, by "An act to regulate the immigration of aliens into the United States" (32 Stat. 1213, c. 1012 [U. S. Comp. St. Supp. 1903, p. 170]).

All these acts, as was the act in regard to contract labor (Act Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290]), are highly penal in their character, and should be so construed as to bring within their condemnation only those who are shown, by direct and positive averments and clear proof, to be embraced within the terms of the law. They should be construed as a whole, and not by selecting particular words or sections, and interpreting them according to their strict letter. *United States v. Gay*, 95 Fed. 226, 37 C. C. A. 46. They should not be so construed as to include cases which, although within the letter, are not within the spirit of the law. All laws should receive a sensible construction. General terms contained therein should be so limited in their application as not to lead to injustice, oppression, or absurd consequences. *Tsoi Sim v. United States*, 116 Fed. 920, 926, 54 C. C. A. 154, and authorities there cited.

The act under consideration provides in section 1 that:

"The following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes."

We are of opinion that this act clearly relates to immigration, and is leveled only against immigrants, although neither of these words

is expressly mentioned in section 10 of the act. Section 3 excludes the encouragement of immigration to this country of aliens by promise of employment. Section 4 makes it unlawful for steamships or transportation companies or vessel owners, by writing or otherwise, to solicit or encourage the immigration of aliens into the United States except in certain specified particulars. Section 6 forbids the bringing into the United States of any aliens not lawfully entitled to enter, and punishes the offense. Section 8 provides that upon the arrival by water of alien immigrants at any port it shall be the duty of the master of the vessel bringing them to make report to the proper inspection officers of the name, nationality, and last residence of every such alien before any of them are landed. The inspection officers are thereupon required to inspect all such aliens, either on board the vessel upon which they have arrived or at some other definite place.

This brings us to section 10, under which the plaintiff in error was indicted. It reads as follows:

"That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid."

Was Marquez an alien immigrant, within the true intent and meaning of the act of Congress? The case is *sui generis*. It stands upon a different footing, and is presented by a different state of facts, from any of the previous cases that have found their way into the courts.

In *Warren v. United States*, 58 Fed. 559, 7 C. C. A. 368, which is the principal case here relied upon by the defendant in error, it was there admitted that certain aliens named in the indictment voluntarily embarked for the United States from a foreign port upon the vessel *Kansas*, and did unlawfully come to the United States upon and by means of said vessel. The plaintiff in error there was the agent of the vessel, and his only contention was that there was no negligence or neglect in detaining the said aliens, and that they escaped without any negligence or neglect on his part. No question was there discussed bearing upon the point under consideration. In reviewing the various sections of the act of March 3, 1891, the court very properly said "that the intention of Congress was the absolute exclusion from this country of all immigrants of the classes named in the act." Here the controlling question is whether the alien Marquez is included in the "classes named in the act."

Was he an alien immigrant, within the meaning of those words as used in the act of Congress? In searching for the intent of Congress in the passage of this act, we must first examine the language

that has been used. Lawmakers must be presumed to know the ordinary meaning of the words used by them. The courts are not invested with any function of legislation. They simply seek to ascertain the intent and will of the legislators. They cannot make any "judicial addition" to the language of the statute. *United States v. Goldenberg*, 168 U. S. 95, 103, 18 Sup. Ct. 3, 42 L. Ed. 394.

The standard dictionaries give the meaning of the word "immigrant": "A person that removes into a country for the purpose of permanent residence." "Immigrate": "To remove into a country for the purpose of permanent residence." "Immigration": "The passing or removing into a country for the purpose of permanent residence." See *Webster's Dictionary* and *Century Dictionary*. This meaning should be applied to the words as used in the statute in order to discover the intent of Congress. This interpretation has been given by the courts to the language used in the act under consideration.

In *United States v. Sandrey* (C. C.) 48 Fed. 550, the court, after reviewing the several sections of the act, said:

"As clearly appears, the act deals only with the importation of aliens under contract to labor and alien immigration. It is only with regard to alien immigrants that the act imposes duties upon the masters and agents of vessels, or provides penalties for the nonperformance of duties by such masters and agents. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence. Aliens composing the crews of vessels visiting our seaports are in no sense immigrants, and, as the review of the statute as above shows, are in no wise affected by the law in question. With regard to them, the said law imposes no duties or penalties upon the masters and agents of vessels."

In *United States v. Burke* (C. C.) 99 Fed. 895, the court reviewed the different sections of the act, and in the course of the opinion said:

"The legislation contained in the various statutes that have been passed relating to immigration is clearly directed against the immigration into this country of certain classes of persons who come in with the intent to enter into and become a part of the mass of its citizenship or population. Immigration is defined to be the entering into a country with the intention of residing in it. The earlier statutes merely prohibit contract laborers being brought in. The later ones prohibit the bringing in of immigrants—persons who come into this country with the intention of remaining, or fixing a residence here—and who are calculated to become a charge upon the country, or who are unfit, on account of moral character, previous conviction of crime, or disease, to be admitted as citizens."

Where the intent of the statute is plain, nothing is left to construction; but, where the mind of the court must labor to discover the design of the Legislature, it seizes upon everything from which it can be derived. In this search courts should not overlook nor ignore the well-known canon of construction, which often proves to be a safe guide in determining the meaning of statutes. The rule is universal in cases of this character that the evil which Congress intended to remedy must be looked at. All the circumstances, conditions, and contemporaneous events which induced Congress to pass the law must be considered and given due weight. We have already sufficiently stated the objects and purposes of the law in this particular.

One of the best-reasoned cases to be found upon this subject is the *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226 (cited and referred to in *Tsoi Sim v. United States*, supra), where the court was called upon to construe the act of February 26, 1885, "to prohibit the immigration of foreigners or aliens under contract or agreement to perform labor in the United States." See, also, *United States v. Craig* (C. C.) 28 Fed. 795, 798; *United States v. Borneman* (D. C.) 41 Fed. 751; *United States v. Gay*, 95 Fed. 226, 230, 37 C. C. A. 46.

From the agreed statement of facts it does not appear that Marquez was an alien immigrant who left a foreign shore to come to the United States for the purpose of becoming a permanent resident here. When he had completed the business which he went upon the vessel to perform, he started to return on shore, but found that the steamer had left. He demanded to be returned to Mazatlan. He protested against coming to the United States. The plaintiff in error refused his demand, but promised him to take him back to Mazatlan on the return voyage of the steamer. He was not required to pay his passage, but was set to work shoveling coal, without being put upon the crew list. The plaintiff in error owed him no duty other than that he promised to perform. When the vessel arrived at San Francisco on June 30, 1901, Marquez stated that he did not want to leave the vessel, but wished "to be returned to Mazatlan as soon as possible." There is no pretense of any fraud. All the acts and agreements between the plaintiff in error and Marquez affirmatively appear to have been in the utmost good faith, and not for the purpose of evading any law.

Notwithstanding the notification given to the plaintiff in error not to land Marquez until permission was obtained from the commissioner of immigration, Marquez was not an immigrant, within the meaning and intent of the act under consideration, and the plaintiff in error was not required to put him in irons, or keep him under guard, to secure his return upon the steamer. The plaintiff in error was not tried upon an indictment charging him with preventing an immigration officer from performing his duty.

The judgment of the District Court is reversed.

(128 Fed. 381.)

MACDONALD v. TEFFT-WELLER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904.)

No. 1,325.

1. BANKRUPTCY—MARRIED WOMEN—OBLIGATIONS—"DEBTS."

Since the separate property of a married woman residing in Florida, under the laws of that state, is liable in equity for her business obligations, where she is engaged in business on her own account, though not a free trader, such obligations constitute debts, within Bankr. Law, § 1, Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], defining the term "debt" to include any debt, demand, or claim provable in bankruptcy, and section 63 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]),

declaring that debts of a bankrupt may be proved and allowed against his estate which are founded on an open account, or on a contract, express or implied.

2. SAME.

Bankr. Law, § 4, cl. "a," Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that any person owing debts, except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt, and clause "b," providing that any natural person, except a wage-earner and certain others, owing debts to the amount of a thousand dollars or over, may be adjudged an involuntary bankrupt, authorizes the adjudication of a married woman as an involuntary bankrupt, where she was engaged in business on her own account, and owed business obligations of the amount required by the statute, for which her separate property was liable in equity.

Petition for Revision of Proceedings in the District Court of the United States for the Southern District of Florida, in Bankruptcy.

Involuntary proceedings were commenced in the court below by filing the following petition:

"To the Honorable James W. Locke, Judge of the District Court of the United States for the Southern District of Florida: The petition of the Tefft-Weller Company, a corporation organized and existing under the laws of the state of New York, and Frederick A. Constable, Alfred G. Evans, and the estate of Hicks Arnold, partners doing business as Arnold, Constable & Company, and John T. Sherman and Charles A. Sherman and Aaron L. Reid, partners doing business as Sherman, Reid & Company, all of the city of New York and state of New York, respectively shows that Ruth E. MacDonald is a married woman, who, with her husband, M. G. MacDonald, has for many years resided in the city of Jacksonville, Duval county, Florida, and is a citizen and resident of said city, county, and state; that the said Ruth E. MacDonald for several years preceding the filing of this petition has been engaged in the business of buying, selling, and trading in dry goods, millinery, notions, bric-a-brac, and other goods, wares, and merchandise in the city of Jacksonville, Duval county, Florida, and has conducted said business in her own name, under the style of Mrs. M. G. MacDonald; that the said business, and said goods, wares, and merchandise, store, and office fixtures and furniture and store accounts are her separate personal property, and that the amounts due by said Ruth E. MacDonald in the conduct of said business to petitioners, hereinafter referred to, were incurred by her for the purchase price of the personal property, to wit, stock of goods in the store and business of said Ruth E. MacDonald, and went to the increase of her separate personal property, and that she therefore charged her separate property with the payment of the same; that the said Ruth E. MacDonald has for the greater portion of six months next preceding the date of filing this petition had her principal place of business and resided in the city of Jacksonville, Duval county, Florida, and the district aforesaid, and owes debts to the amount of one thousand dollars; that your petitioners are creditors of said Ruth E. MacDonald, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars; that the nature and amount of your petitioners' claim are as follows: That the claim of the Tefft-Weller Company consists of an open account for the sum of two hundred and thirty-seven and $\frac{21}{100}$ dollars (\$237.21), and is for goods, wares, and merchandise sold and delivered by said the Tefft-Weller Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said the Tefft-Weller Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same; that the claim of Frederick

¶ 2. What persons are subject to bankruptcy laws, see note to *Maltoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.

A. Constable, Alfred G. Evans, and the estate of Hicks Arnold, partners doing business as Arnold, Constable & Company, consists of an open account for the sum of three hundred and thirteen and $\frac{12}{100}$ dollars (\$313.12), and is for goods, wares, and merchandise sold and delivered by said Arnold, Constable & Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said Arnold, Constable & Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same; that the claim of John T. Sherman and Charles A. Sherman and Aaron L. Reid, partners doing business as Sherman, Reid & Company, consists of an open account for the sum of one hundred and eighty one and $\frac{1}{100}$ dollars (\$181.01), and is for goods, wares, and merchandise sold and delivered by said Sherman, Reid & Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said Sherman, Reid & Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same. And your petitioners further represent that the said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald, is insolvent, and that within four months next preceding the date of filing this petition the said Ruth E. MacDonald committed an act of bankruptcy, in that she did heretofore, to wit, of the 26th day of May, 1903, while insolvent, execute and deliver to the Mercantile Exchange Bank, a corporation organized and existing under the laws of the state of Florida, and a creditor of the said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald, a chattel mortgage for forty-four hundred dollars (\$4,400.00), on the lease of Ruth E. MacDonald, in the name of Mrs. M. G. MacDonald, to store number 102 West Forsyth street, in the city of Jacksonville, Duval county, Florida, and all of the personal property of said Ruth E. MacDonald, under the name of Mrs. M. G. MacDonald, therein contained, consisting, among other things, of dry goods, millinery, notions, bric-a-brac, vases, art household furnishings, and other merchandise and stock in trade, kept and exposed for sale in said storeroom, and also all office and store fixtures and furniture, safe, shelves, show cases, and furnishings, and also all such other personal property in said storeroom contained, said property being described in said mortgage as 'being the separate statutory property of the said Ruth E. MacDonald,' and that thereafter, to wit, on the 27th day of May, 1903, the said mortgage was recorded in the public records of Duval county, Florida, in Mortgage Book 11, at page 273; that said mortgage was given for the purpose and with the intent of securing and preferring the said Mercantile Exchange Bank over other creditors of the same class of the said Ruth E. MacDonald; that the effect of the enforcement of such mortgage will be to enable the said Mercantile Exchange Bank, one of the creditors of the said Ruth E. MacDonald, to obtain a greater percentage of its debt than any other of such creditors of the same class. Wherefore," etc.

Mrs. MacDonald appeared by counsel, and filed demurrer to the foregoing petition on the following grounds:

"(1) There are not three or more citizens of the alleged bankrupt petitioners in the above-entitled petition; (2) that there are not three petitioners, creditors of the alleged bankrupt, parties to the above-mentioned petition; (3) that the 'Estate of Hicks Arnold' cannot be a party to this cause in such words; (4) that a partnership consisting partly of the 'Estate of Hicks Arnold' cannot be one of the three petitioners required by law in a petition for an involuntary adjudication in bankruptcy; (5) that a married woman residing in Florida cannot be adjudicated a bankrupt; (6) that there is no personal liability for her obligations resting upon a married woman residing and doing business within the state of Florida, which obligations would be enforceable against her, and that a married woman cannot be adjudicated a bankrupt; (7) that in this court a married woman not a free dealer cannot be adjudicated a bankrupt."

The court below overruled the demurrer, and this court is asked to revise the proceedings on the following grounds:

"That a married woman residing in Florida cannot be adjudicated a bankrupt; that there is no personal liability for her obligations resting upon a married woman residing and doing business within the state of Florida, which obligations would be enforceable against her, and that a married woman cannot be adjudicated a bankrupt; that in this court a married woman not a free dealer cannot be adjudicated a bankrupt."

Francis P. Fleming, Francis P. Fleming, Jr., and Wm. B. Owen, for petitioner.

Charles M. Cooper and John C. Cooper, for respondents.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

PARDEE, Circuit Judge (after stating the facts as above). The question presented is whether, under the facts alleged in the petition in this case, a married woman in the state of Florida, having separate statutory property, and engaging in trade, buying, and selling on her own account, but not a free dealer, can be adjudicated a bankrupt under the bankrupt law of 1898.

Under sections 1505-1509, Rev. St. Fla. 1892, a married woman may have her disabilities removed, and she may have a license as a free dealer authorized to contract, sue, and be sued, and in all respects to bind herself as if she were unmarried. See *Martinez v. Ward*, 19 Fla. 175.

By article II of the Constitution of the state of Florida of 1885 it is provided:

"Section 1. All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterwards by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women.

"Sec. 2. A married woman's separate real or personal property may be charged in equity and sold, or the uses, rents and profits thereof of sequestered for the purchase money thereof; or for money or thing due upon any agreement made by her in writing for the benefit of her separate property; or for the price of any property purchased by her, or for labor and material used with her knowledge or assent in the construction of buildings, or repairs, or improvements upon her property, or for agricultural or other labor bestowed thereon, with her knowledge and consent.

"Sec. 3. The Legislature shall enact such laws as shall be necessary to carry into effect this article."

It does not appear that there has been any legislation under section 3 of said article, but "it is well settled," says the Florida Supreme Court in *First National Bank of Pensacola v. Hirschowitz*, 35 South. 22:

"In an unbroken line of decisions, beginning with *Lewis v. Yale*, 4 Fla. 418, down to the present time, this court has held that 'a feme covert is not competent to enter into contracts so as to give a personal remedy against her.' As was said in *Dollner v. Snow*, 16 Fla. 86: 'At common law the promissory note of a married woman is void. The Constitution and statute of this state make no change in this respect. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her.' Under the rule laid down in these decisions, appellants could not have proceeded at law against the said married woman, Dora Hirschowitz, and hence could not have

reduced their claims to judgment; also see *Crawford v. Feder*, 84 Fla. 397, 16 South. 287."

In the headnotes to this report, which in Florida are prepared by the judges, No. 1 reads as follows:

"At common law the promissory note of a married woman is void. The Constitution and statutes of this state make no change in this respect, unless said married woman shall have been made a free dealer. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her."

The court further says:

"It is also the settled law of this state that 'where a married woman carries on business in her own name, having property employed in such business, and purchases goods upon her sole credit for the purpose of such business, her separate property may be subjected in equity to the payment of claims for money due for such purchases.' *Blumer v. Pollak*, 18 Fla. 707. Also see *Staley v. Hamilton*, 19 Fla. 275; *Garvin v. Watkins*, 20 Fla. 151, 10 South. 818; *Halle v. Einstein*, 34 Fla. 589, 16 South. 554. In *Crawford v. Gamble*, 22 Fla. 487, it was held that 'merchandise purchased by a married woman who is conducting a mercantile business in her own name is her separate statutory property.'"

From these references to the law in Florida it appears that a married woman having separate statutory property, although not a free dealer, can lawfully carry on business, buy and sell upon her sole credit, and thus contract obligations binding upon her property in all respects as if she were a feme sole, except that she cannot be held personally liable at law; the creditors' legal remedy upon her contracts being in equity, under which all her separate property may be taken. That is to say, that such married woman may contract a debt which she morally owes—owes in equity and good conscience, lawfully owes—but which she cannot be personally adjudged to pay.

Is the limited obligation thus resulting a "debt," within the meaning of the word as used in section 4 of the bankrupt law of 1898? Clause "a," § 4, Bankr. Law, July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." Clause "b" provides that "any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default, or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act." Blackstone defines a "debt" as follows: "A sum of money due by certain and express agreement, as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it." 3 Bl. Com. 154. Again: "Any contract, in short, whereby a determinate sum of money becomes due to any person and is not paid, but remains in action merely, is a contract of debt." 2 Bl. Com. 464. "The word 'debt' is of large import, including not only debts of record or judgments and debts by specialty, but also

obligations arising under simple contract to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise." *Gray v. Bennett*, 3 Metc. (Mass.) 522, 526; *Shane v. Francis*, 30 Ind. 93. "A 'debt' signifies whatever one owes. There is always some obligation that it shall be paid, but the manner in which, or the condition upon which, it is to be paid, or the means of recovering payment, do not enter into the definition." *Rodman v. Munson*, 13 Barb. 197. "A debt is a sum of money due by contract, express or implied." *Perry v. Washburn*, 20 Cal. 350. Section 1 of the bankrupt law of July 1, 1898, c. 541, which gives the meaning of words and phrases used in the act, provides in paragraph 11 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), "'debt' shall include any debt, demand or claim provable in bankruptcy," and section 63 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]), relating to debts which may be proved, provides as follows: "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account or upon a contract express or implied."

These broad definitions of "debt" from the text-books, adjudicated cases, and the bankrupt law all clearly include the obligation lawfully contracted by a married woman, not a free dealer, in the state of Florida, dealing with her separate estate.

We are referred to no adjudicated cases on the question as to whether a married woman can be adjudicated a bankrupt under the present law—all the cases cited are under other and former laws.

The English cases cited, and much relied on by counsel for petitioner (*Ex parte Jones*, *In re Grissel*, 12 Chan. Div. 484, and *In re Gardiner*, *Ex parte Coulson*, 20 Q. B. Div. 249), lose much of their force here, because the married women's property act, 45 & 46 Vict., provides: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." And section 152 of the bankruptcy act provides: "Nothing in this act shall affect the provisions of the married women's property act 1882."

In *In re Kinkead*, 3 Biss, 405, Fed. Cas. No. 7,824, a case decided under the law of 1867, wherein it was held that a married woman residing in Illinois could be adjudicated a bankrupt, seems to have turned upon the laws of Illinois with regard to the rights of married women. In the note by the learned reporter in that case many of the current decisions in this country and in England are reviewed, and the reporter sums up as follows:

"Impossible as it may be to reconcile the decisions on the general question of the rights and liabilities of married women, the duty of the federal courts in administering the bankrupt act would seem to be simply to determine the status of a married woman under the existing laws of the state where the jurisprudence is to be exercised, and administer the act upon the basis of the principles thus discovered. The foundation of bankruptcy proceedings is indebtedness; but the bankrupt act does not make any new standard of liability—it simply operates upon those already existing. The application of the act to married women depends, clearly, not upon their rights, but their liabilities, and those liabilities are determined by the law of the forum where the jurisdiction is invoked."

From what has been said, it follows that we do not agree with the learned counsel, whose able oral argument and exhaustive brief have received our close attention, that the test is whether the contracts of an alleged bankrupt can be enforced by judgment in personam, but rather is whether the said contracts constitute an existing indebtedness.

The object of the bankrupt law is twofold—the benefit of the creditors and the relief of the bankrupt. Mr. Justice Story describes a bankrupt law as “a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts.” 2 Story, Const. § 1113, note 2. Mr. Stephen speaks of it as “a system of law of a peculiar and anomalous character, intended to afford to the creditors of persons engaged in trade a greater security for the collection of their debts than they enjoyed at common law under the ordinary remedy by action.” 2 Steph. Com. 189. It cannot be necessary that both objects shall be attainable in order to warrant proceedings in bankruptcy. In many, perhaps a majority, of cases, the relief to the bankrupt is the only question, for there are no assets to distribute, and in many other cases the benefit and relief of creditors is the only object. A bankrupt may through fraud have lost his right to a discharge. An insolvent corporation whose property, including all franchises, has been distributed to creditors in involuntary proceedings in bankruptcy, takes little, if anything, by a discharge.

But this can be said for the petitioner that, if she is discharged in bankruptcy, and thereafter she is sued at law or in equity, she can plead the discharge in bankruptcy as well as coverture, and with regard to after-acquired separate property she will be relieved from all her present obligations. The legal as well as the general trend of the day is towards emancipating women, married or single, from all legal and other disabilities not bearing on the other sex, and particularly in all directions wherein she is thought to be handicapped in earning a living, taking care of her property, or carrying on business. And if a married woman is encouraged and permitted to carry on business, buy and sell—in short, be a trader, as she is in Florida—why, when she is unfortunate in business and burdened with debts, shall she not, like the married man, be entitled to claim and have her debts wiped from the slate under the more or less wise provisions of the bankrupt law?

On the whole matter, we conclude that neither the terms nor the policy of the bankrupt law of 1898, nor any outside public policy, preclude, because of coverture, a woman owing debts exigible against her property from being adjudicated a bankrupt; and it follows that the question stated at the beginning of this opinion must be answered in the affirmative, and that this petition for revision be denied.

And it is so ordered.

(128 Fed. 388.)

MacMAHON et al. v. UNITED STATES LIFE INS. CO.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1904.)

No. 1,223.

1. LIFE INSURANCE—PAYMENT OF RENEWAL PREMIUM—ACCEPTANCE OF DRAFT AFTERWARD DISHONORED.

Defendant issued life insurance policies, which were delivered on receipt of a year's premiums. They provided that they might be renewed from year to year by the payment of similar premiums within the days of grace allowed after the expiration of each year. After some years the insured wrote from Mexico asking defendant whether it had an agent there to whom a renewal premium could be paid, and, if not, to whom it could be sent, and received an answer that it might be sent to New York "by check, draft, or money order payable to the order of the company." Insured purchased a New York draft from a reputable bank in Mexico, payable to defendant's order, and mailed it to defendant, which received it before the expiration of the year, sent the insured renewal receipts for another year, and deposited the draft for collection. Subsequently, but before the draft was paid, the drawer bank suspended, and it was not paid. Defendant demanded the return of its renewal receipts, and, not receiving them nor further payment, declared the policies canceled, and refused to accept a renewal premium tendered a year later. *Held*, that the draft was not sent in payment of any indebtedness from the insured to defendant, the insured purchasing renewed insurance each year for cash; that having purchased a draft for the amount of a year's renewal premiums, payable to defendant and not indorsed by him, in accordance with defendant's instructions, which it received and accepted in payment for such renewed insurance before the suspension of the bank which issued it, defendant could not charge the loss thereon to the insured, and cancel his policies as for nonpayment of the premium.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Plaintiffs in error, citizens of Texas, sued defendant in error, a New York corporation, in an action at law on three policies of life insurance, aggregating \$10,000, issued by the defendant on the life of Rudolph C. MacMahon, payable on his death to the plaintiff Agnes MacMahon, his wife, who had, before suit, assigned a half interest to her coplaintiff Charles W. Batsell. The defense pleaded was that the policies became void before the death of the insured, on account of nonpayment of premiums. The Circuit Court sustained this defense, and directed a verdict for the defendant. The policies were issued on the 22d of January, 1896, by the defendant in New York, and were thereafter delivered to the insured in Texas. Annual premiums amounting to \$183.90 each year were payable in New York at the company's office, and in case of loss by death of the insured the policies were likewise payable there. Each policy contained the following provision: "This policy shall take effect only upon actual payment of the first premium hereon, and delivery of this policy to the assured (during the life time and sound health of the insured), in exchange for the company's receipt for said payment signed by the president, secretary, assistant secretary, or actuary. Failure to make payment of any subsequent premium, either to the company or to a duly authorized agent, in exchange for receipt signed as above, or non-payment of principal or interest on any note given in connection with this policy, when due, will render this contract null and void. Whenever this policy shall become null and void from any cause, all payments made hereunder shall become forfeited to the company, except that, after being in force three full years an extended insurance shall be allowed, in accordance with the requirements of chapter 690 of the Laws of 1892 of New York." The annual premiums for the first and second years were duly paid, and on the 25th of November, 1897, the insured wrote the defendant from Puebla, Mexico, where he was then sojourning, and, referring to the policies and the premiums

that would be due on the 22d of January, 1898, said: "I beg to come to you for information as to whom amount of premiums should be remitted. Have you an agent in Mexico authorized to receipt for such remittances, and if so, where? If not, shall I remit to New York office and to whom?" In reply, the defendant wrote him on the 3d day of December, 1897, as follows: "In reply to your communication of the 25th ult. would say that we have no agent in Mexico. We would therefore request you to please remit the premiums falling due on your policies 85,650-51-52 direct to this office within the grace allowed. Remittance may be made by check, draft or money order, payable to the order of the company." Thereafter the plaintiff, Agnes MacMahon, purchased from the bank of Leon Raast, of the associated firm of Leon Raast and Raast, Headen & Co., of Puebla, Mexico, a draft or bill of exchange, payable to the defendant's order, drawn on Chas. Einsiedler, Rept. del Credit Lyonnais, New York, for \$183.90 in American gold, for which she paid par, and this draft, without indorsement, was inclosed by the insured in a letter written from the City of Mexico to the defendant on the 10th of January, 1898, reading thus: "Enclosed please find draft for \$183.90, being the amount due on my life policies Nos. 85,650, 85,651 and 85,652, due Jan. 22. Please mail receipts to me at above address, and oblige." The defendant received this letter and the accompanying draft on the 20th of January, 1898, and deposited the draft for collection and credit with the Importers' & Traders' National Bank of New York, that being its usual bank of deposit. Acknowledgment was made to the insured by letter dated the 21st of January, 1898, reading as follows: "Your favor of the 10th is received with remittance of one hundred, eighty-three, 90-100 Dollars, being amount of premiums due Jan. 22, 1898, on policies No. 85,650-1-2. Enclosed please find receipts for same, with postal card, which kindly fill out with your P. O. address in full, date, sign and mail to us, to complete our records, on which your address now is, 'El Paso, Texas.'" Inclosed with this letter were the receipts referred to. One of the receipts read: "\$73.56. Received Seventy-three & 56-100 Dollars; being the annual premium due on the 22nd day of January, 1898, on Policy on the life of Rudolph C. MacMahon, Policy number 85,650, subject to all the provisions, conditions and agreements contained in the above mentioned policy and the application therefor, and those endorsed hereon, all of which are hereby referred to and made a part hereof. This receipt is not binding unless countersigned by the company's cashier or by _____, agent. [Signed] C. P. Farleigh, Secretary." Across the face of this receipt was the following: "Countersigned by Arthur C. Perry, Cashier," the words "Countersigned by" being stamped, and "Arthur C. Perry, Cashier," being signed. There were notices and statements printed on the back, which are not deemed material. The other receipts were exactly like this, except as to amount and the numbers of the policies. On the 21st of January, 1898, the Importers' & Traders' National Bank presented the aforesaid draft to the drawee for payment, and payment was refused for want of funds, but the drawee stated that he supposed funds were on the way, and if the draft should be held it would probably be paid. The draft was then held until the 24th of January, 1898, when it was again presented, and, payment being again refused, was protested. One of the intervening days was Sunday, and another, being Saturday, was half holiday. The bank of Leon Raast suspended payments on the 21st of January, the day after this draft was received in New York. On the 25th of January, 1898, the defendant returned the dishonored draft to the insured, in a letter reading as follows: "We beg leave to advise you that the draft of Leon Raast, of Puebla, Mexico, on Chas. Einsiedler, Rept. del Credit Lyonnais, New York, to our order, for \$183.90, enclosed with your favor of the 10th inst. to pay premiums due the 22nd inst. on policies 85,650-51-52 upon your life was not paid upon presentation and has been protested for non-payment. We return said draft (with protest certificate) herewith. Said draft not having been paid, of course the premiums were not paid, and we therefore demand that you return at once the renewal receipts sent you on the 21st inst. As you are aware, the grace allowed for payment of these premiums expires on Feb. 22nd proximo, and unless the remittance for said premiums be paid by you on or before that day, the policies will become forfeited. You will also please send us remittance of \$1.25 for notary's fee on the protested

draft." Neither the receipts nor the draft were ever returned to the defendant, nor did the insured remit, and after some correspondence the defendant, on the 5th of April, 1898, wrote the insured stating that the policies had lapsed owing to nonpayment. On the 12th of December, 1898, the insured notified the defendant by letter that he would probably tender the premiums due in January, 1899, and the defendant replied on the 14th of January, 1899, reasserting that the premiums of 1898 had not been paid, and that the policies had consequently lapsed. Thereafter, on the 17th of February, 1899, the insured, through a representative of Wells, Fargo & Co.'s Express, tendered the defendant in lawful money, at its office in New York, \$183.90 in payment of the premiums due on the 22d of January, 1899. This the defendant refused to accept, on the ground that the policies had become forfeited and void by nonpayment of the premiums due on the 22d of January, 1898. No further payment or tender of premiums was ever made, and on the 30th of January, 1901, the insured died. There was a clause in the policies requiring proofs of death upon the company's blanks, and during the month of February, 1901, the plaintiff Agnes MacMahon applied to the defendant for blank forms to make out and furnish proofs of death, whereupon the defendant declined to furnish such blanks, and denied liability under the policies. Payment was formally demanded and refused, and the present action brought. The trial judge directed a verdict for the defendant. Plaintiff sued out error, and, with appropriate assignments, presents this action of the trial judge as erroneous.

A. L. Beaty, for plaintiffs in error.

Geo. Clark and D. C. Bolinger, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, having stated the case, delivered the opinion of the court.

In our opinion, the Circuit Court erred in directing a verdict for the defendant in this case. The policies were issued on the 22d of January, 1896, by the defendant, in New York, and were thereafter delivered to insured, in Texas. Each of these policies contained the following provision:

"This policy shall take effect only upon actual payment of the first premium thereon, and delivery of this policy to assured during the life-time and sound health of the insured, in exchange for the company's receipt for said payment signed by the president, secretary, assistant secretary or actuary."

It is clear that the dealings of the parties were for cash. No credit was in the contemplation of either, and there was no opportunity for a debt from the insured to the defendant to arise. The carefully guarded provisions with reference to the issuance of the binding receipts show that it was in contemplation of both parties that a receipt was to be delivered only upon payment of the premiums, and that its delivery put the contract evidenced by the policy into effect, to continue for the space of one year, with allowed grace. By the terms of the policies the company offered the insured the privilege of renewing the same in precisely the same manner—that is to say, for cash to be paid during the life of the policy (one year, with allowed grace)—and to obtain therefor a similar receipt, carefully guarded in its terms and execution, which should have the effect to continue the policy for the period of another year, with grace. In the provisions for such renewal—if renewal should be desired by the insured—there was the same absence of any intent on the part of either of the parties

to deal on credit, or to permit the bringing into being of a debt from the insured to the company. When the original dealings took place, the insured and his wife (the assured) were sojourning in Waco, Tex. The premiums then paid, and a like amount subsequently paid, carried the policies in full force up to the 22d of January, 1898. In the fall of 1897 the insured was sojourning in the city of Puebla, Mexico, from which city he wrote the defendant asking information as to whom future premiums should be remitted; whether they had an agent in Mexico authorized to receipt for such remittances, and if so, where? and, if not, whether he should remit to the New York office, and to whom? The defendant replied: "We have no agent in Mexico. You will remit premiums to the New York office within the grace allowed. Remittance may be made by check, draft or money order, payable to the order of the company." In compliance with this advice and directions, the insured procured in the city of Puebla, Mexico, banker's New York exchange, drawn "payable to the order of the company," for \$183.90, American gold, and forwarded the same by mail to the defendant at its New York office, where it was duly received by the defendant on January 20, 1898. At this time the policies were still in force, and the insured was not indebted to the defendant in any amount. On the afternoon of January 20, 1898, this banker's draft, "payable to the order of the company," and not indorsed by the insured, the defendant deposited for collection and credit with the Importers' & Traders' National Bank of New York, that being its usual bank of deposit; and on the same day the defendant issued and mailed to the insured's address premium receipts in the customary and usual form, which, in due course of the mails, came into the possession of the insured. On the most approved judicial authority, it seems clear to us that this transaction, in no one of its particulars, evidences or tends to show the existence of a debt from the insured to the defendant; but, on the contrary, negatives such existence, and permits no inference to be made other than that the dealing was strictly cotemporaneous—the offer of a given price for a given kind and quality of insurance, and the acceptance of the offer as tendered. There is nothing in the evidence tending to show that at any time the insured obligated himself to pay the amount of the premiums, or did any act from which such an obligation could have been implied. The mere sending of the draft in compliance with advice and directions, "payable to the order of the company," and not indorsed by him, gave the defendant no right of action against him. It could not sue him on the draft, because he was not a party to it; it could not sue him on any obligation to pay the future premiums, because he had entered into no such obligation. He had parted with his money to the "drawer bank" in the city of Puebla, Mexico, and obtained the drawer bank's draft for the amount in American gold, which was the price of the article he wished to buy, namely, the defendant's receipts, which would put in force for another given period from the 22d of January, 1898, the policies originally obtained from the defendant. If we grant that the defendant need not have accepted this draft, and need not have executed and delivered to the insured, by mailing the same to him, the binding receipts until the draft was paid (as to which we express no opinion),

it did, immediately upon receiving the bill of exchange, execute and forward to the insured the very article which the bill was sent to buy. If the defendant had brought an action at law against MacMahon for the amount of the premiums, counting on the same as a debt, or had brought its action on the draft, the courts would have held that MacMahon was not bound, and that the defendant's recourse was on the "drawer bank." In determining the question before us, we deem it immaterial whether the contracts of insurance are held to be New York contracts or Texas contracts. In our consideration of this case we have not proceeded on any theory that the law of New York has peculiar application to the action on these contracts. The decisions cited have the authority of the high court which rendered them, and of the sound reasoning with which they are supported in the opinions which accompanied their deliverance. *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 620; *Shaw v. Insurance Company*, 69 N. Y. 292; *Gibson v. Tobey*, 46 N. Y. 649, 7 Am. Rep. 335; *Youngs v. Stahelin*, 34 N. Y. 264; *Noel v. Murray*, 13 N. Y. 167; *Whitbeck v. Van Ness*, 11 Johns. 409, 6 Am. Dec. 383.

Of the decisions of the United States Supreme Court, cited by counsel for defendant, we have examined: *Iowa Life Insurance Company v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204; *Mutual Life Insurance Company of New York v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181; *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; *Klein v. Insurance Company*, 104 U. S. 88, 26 L. Ed. 662; and *Thompson v. Insurance Company*, 104 U. S. 252, 26 L. Ed. 765. We have found nothing in either of them which is inconsistent with the views we have expressed. The case of *National Loan & Insurance Company v. Goble*, 51 Neb. 5, 70 N. W. 503, does support the contention of the defendant, but we are satisfied that it is in opposition to the weight of precedent, and we decline to follow it.

There was, in these dealings of the insured with the defendant, not the slightest odor of fraud or trace of unfairness. The exchange on New York was drawn in the city of Puebla, Mexico, by a bank in good standing and credit at the time the bill was purchased, and was sent by mail to the defendant, and was received by it at New York before the "drawer bank" suspended payment. In accordance with the defendant's directions, the draft was made "payable to the order of the company." It was not indorsed by the insured. It cost the insured in actual money the precise amount for which it was drawn. The insured having been induced by the defendant to purchase it, and having parted with his money in perfect good faith, and duly delivered it to the defendant, which thereby became the owner of it, the resulting loss must rest with it, the owner at the time the loss occurred. The transaction, therefore, must be held to constitute payment of the premiums which the insured wished to pay and for which the defendant receipted, giving the policies effect for one year, with grace, from the 22d of January, 1898.

There can hardly be a question that the subsequent actions of the defendant relieved the insured and the assured from the duty of re-mitting premiums to cover the subsequent years up to the death of

the insured. Within the year and allowed grace from the 22d of January, 1898, the insured made actual tender of the amount to meet the premiums required to give the policies effect after the 22d of January, 1899, and the money was refused on the ground that the policies had become void. The strictest law and the most searching equity did not require the repetition of this tender, without notice from the defendant that it would be received. The defendant having received payment of the third premium by the acceptance of the draft and its action thereon, and having refused to accept the tender subsequently made, the policies did not become void, and the assured's rights thereunder were not forfeited. Of course, the unpaid premiums are to be deducted, with interest, from the time at which they would have been received but for the action of the defendant.

It follows that this case must be reversed and remanded to the Circuit Court, with directions to that court to grant the plaintiff a new trial, and thereafter to proceed in the same in conformity with the views expressed in this opinion.

The question we have discussed seems to be the only one that is really controverted between the parties, therefore the other features of the case require no comment from us.

Reversed and remanded.

PARDEE, Circuit Judge, concurs in the result.

On Rehearing.

(April 5, 1904.)

PER CURIAM. The petition for rehearing is denied.

(128 Fed. 393.)

HECKMAN et al. v. SUTTER et al.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1904.)

No. 792.

1. PUBLIC LANDS—ALASKAN TIDE LANDS—RIGHT OF OCCUPANCY.

The provision of section 8, Act May 17, 1884, c. 53, 23 Stat. 24, 26, establishing a civil government for Alaska, and creating a land district therein, that "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress," applies to all lands, including tide lands, over which the federal government has exclusive jurisdiction and power of disposal, and protects possessory rights which were then exercised and claimed for fishing or other purposes by occupants of adjoining uplands against others who assert a common right to fish thereon.

Appeal from the District Court of the United States for the First Division of the District of Alaska.

Chickering & Gregory, for appellants.

Piles, Donworth & Howe and Winn & Shackleford, for appellees.

Page, McCutchen & Knight, amici curiæ.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The case, as well as the acts of Congress bearing upon the question involved, will be found stated in the opinion of this court delivered on the former hearing. 119 Fed. 83, 55 C. A. 635. We there said:

"When, in 1884, Congress undertook to provide a civil government for Alaska, it made of the territory a land district; located a United States land office at Sitka; put in full force and effect therein 'the laws of the United States relating to mineral claims and the rights incident thereto,' with certain conditions not necessary to be mentioned, withholding therefrom the application of the general land laws of the United States, and expressly declaring 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.' Section 8, Act May 17, 1884, c. 53, 23 Stat. 24, 26. There has been no 'future legislation by Congress' that applies to the present case, for this case involves no question of purchase or entry, and concerns only the right of occupancy and use of certain of the lands of the United States, including a small strip of tide land, as against a similarly asserted right on the part of third persons, which occupancy and use in no manner interferes with the right of navigation of the public waters. The prohibition contained in the act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high-water mark. Nor is it surprising that Congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands, of whatever character, by means of which they eked out their hard and precarious existence. The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known to the legislative branch of the government, as well as the fact that that business, if conducted on any substantial scale, necessitated the use of parts of the tide flats in the putting out and hauling in of the necessary seines. Congress saw proper to protect by its act of 1884 the possession and use by these Indians and other persons of any and all lands in Alaska against intrusion by third persons, and so far has never deemed it wise to otherwise provide. That legislation was sufficient authority, in our opinion, for the decree of the court below securing the complainants in the use and possession of land which the evidence shows and the court found was held and maintained at the time of their disturbance therein by the defendants, and for years theretofore had been so held and maintained."

Further consideration has but confirmed us in the correctness of these views. The act of 1884 made no provision for the disposition of the title of any of the public domain except mineral lands; on the contrary, it thereby expressly withheld from Alaska the application of "the general land laws of the United States." Section 8, Act May 17, 1884, c. 53, 23 Stat. 24, 26. Those general land laws are not, therefore, the source from which to derive the meaning of Congress in using the words "any lands" in the proviso of the act of May 17, 1884, "that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." Having extended to Alaska the laws of the United States relating to mineral claims only, if Congress had intended to protect the Indians and other persons in their possession of or claim to such mineral claims only, one would naturally expect the intention to be manifested by the words "such mineral claims," or "such mineral lands," or other equivalent limited expression, and not by the broad and comprehensive words "any lands," used in the act of 1884. Nor is it reasonable to suppose that Congress

intended the broad and comprehensive terms thus used by it to be limited by the interpretation put upon the term "public lands" in the general land laws, which it expressly provided should not be in force in Alaska. In providing for a civil government for that territory, as it did by the act of 1884, Congress was dealing with the then condition of the country; and in providing for such a government it saw proper to protect the existing possession of any and all lands then held by the Indians or other persons in the territory. These, as Congress must have known, were at the time but few in number. It did not provide for the protection of the possession of any lands by any person or persons who might acquire possession or make claim thereto in the future. It is true that it has never been the policy of the United States to dispose of its tide lands, but, on the contrary, that its policy has always been to retain them for the benefit of the future state in which they might lie. But it is thoroughly settled that the United States has all the power of national and municipal government over its territories, and may, if it sees fit to do so, grant rights in or titles to the tide lands of its territories as well as the public lands therein situated above high-water mark. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, and the numerous cases there cited.

Most of our people thought that Mr. Seward was engaged in a sorry business when, in 1867, he bought from Russia for \$7,200,000 what is now the territory of Alaska, from whose ground is now taken by the enterprising miners more than that amount in gold in a single summer. Who knows but that, with its rapid settlement, the building of roads and railroads, telegraph and telephone systems, the development of its vast fisheries and mines and other possible resources, Congress may some day admit it to statehood, with the same right to the tide lands within its borders that passed to California, Oregon, and Washington upon their admission to the Union? In each of these states, in providing for the disposal of such tide lands, the Legislature gave a preferred right of purchase to persons in possession thereof, and who had erected improvements thereon. *St. Cal.* 1867-68, p. 716, c. 543; *Hill's Ann. Laws Or.* 1892, § 3599; *St. Wash.* 1889-90, p. 431. In the state of Washington the statute cited conferred upon the upland proprietor the preferred right of purchasing the tide lands in front of him, and the Supreme Court of that state in the case of *West Coast Improvement Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441, held that no mere trespasser should be allowed to occupy or in any manner interfere with the possession of the upland owner of the tide lands upon his front, until such time as he could exercise his right to purchase the same from the state; saying, among other things:

"If the courts should hold that the upland owner had no right to prevent one having no claim whatever from squatting upon tide lands in his front, we should have such a state of facts existing as would tend greatly to the prejudice of the public interests. The delays of the law are such that it may be years before it will be finally determined as to the right to acquire ownership under the state, and if, during all that time, the possession of such tide lands is to be the subject of an uncontrolled scramble between those claiming no right whatever thereto, a most objectionable state of affairs will be inaugurated. In our opinion, the courts are not obliged to sit idly by and allow the unrestrained

cupidity and passions of trespassers, in which might will be the all-powerful factor, to have full play. The courts, by retaining matters in statu quo, will in no manner interfere with the rightful jurisdiction on the part of the proper authorities as to the possession and ownership of the tide lands of the state."

There was, as was said in our former opinion herein, nothing very surprising in the fact that Congress, in first dealing with the then sparsely settled territory of Alaska, was disposed to protect its few inhabitants in the possession of lands, of whatever character, until it should see fit to make other disposition of them. In referring to the proviso of the act of 1884, by which it did so, the District Court for the District of Alaska, in charging the jury in the case of *Carroll v. Price*, 81 Fed. 137, said:

"The court therefore charges you that the United States holds paramount title to tide lands in this territory; and, where the right of navigation is not impaired, rights of possession by citizens of the United States to such tide lands will be determined by the same rules of law as govern similar rights on the uplands; and this court will apply to the tide lands the rules that American citizens may occupy, possess, use, and improve the same, subject, however, to the paramount right of free navigation; and that the prior possession will determine the prior right, until 'future legislation by Congress,' as to uplands, or until the ultimate sovereign, whether state or federal, having title to tide lands, shall otherwise provide in relation thereto."

That case was referred to by the Supreme Court in the case of *Malony v. Adsit*, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163, which was an action to recover possession of an undivided half of a tract of land in the town of Juneau, Alaska, the plaintiff relying solely upon right of prior occupancy and actual possession, which was sustained both by the trial court and by the Supreme Court on appeal. In the course of the opinion of the Supreme Court it was said:

"The same view of the nature of a title to a lot in a town site in Alaska, under these acts of Congress, was expressed by the District Court of the United States for the District of Alaska in the case of *Carroll v. Price*, 81 Fed. 137. As, then, the only kind of estate that could be held was that of possession, it was sufficient for the plaintiff to allege that his was of that nature."

It is a mistake to suppose that the right to control and regulate the fisheries is on the same plane with the right to control navigation. The latter is paramount, and always resides in the general government. The right of fishery is, it is true, a common right, but it may be regulated and controlled by a state. In *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248, the question involved was whether the state of Virginia could prohibit the citizens of other states from planting oysters in Ware river, a stream in Virginia where the tide ebbed and flowed, when its own citizens had that privilege. In that case it was said that the principle has long been settled that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away; and that in like manner the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running; and the court added:

"The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish,

so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

This property right, while existing within a territory of the United States, is, as has been seen, within the absolute control of Congress; and when, as in the case in hand, the reasonable exercise of it requires the clearing and use of a small portion of the tide lands, there seems nothing even unjust in protecting such possession against the invasion of a rival in the business. Nor does such temporary concession of such right of occupancy in any way involve a concession of any title to such tide lands, or any permanent right of possession. The case of *Pacific Steam Whaling Co. v. Alaska Packers' Association* (Cal.) 72 Pac. 161, is readily distinguishable from the present case. In that case no reference whatever was made to the act of Congress of May 17, 1884, upon which our judgment rests, nor did it appear there that the Alaska Packers' Association claimed to have been in the possession of the piece of tide land there in question at the time of the passage of the act of 1884 by Congress, or that it claimed such possession under any person who was in such occupancy at that time; and the court itself was careful to add to its observations on the common right of fishing in the public waters the following:

"We need not inquire to what extent the government—either federal or state—could give an exclusive private right of fishery in such public waters. No such right is asserted here." 72 Pac. 163.

The judgment is affirmed.

(128 Fed. 397.)

WEISSHAAR v. KIMBALL S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1904.)

No. 991.

1. SHIPPING—DROWNING OF PASSENGERS FROM OVERLOADING BOAT—DEFENSE OF CONTRIBUTORY NEGLIGENCE.

Where the officer in charge of a boat sent ashore from a ship to bring off passengers stated that she was overloaded, and requested some of the passengers to get out and wait until he could return, but, on their refusal to do so, made no further attempt to exercise his authority, but started, carrying 18 persons and a quantity of baggage, whereas the boat's capacity was 14 persons, and made no effort to return when, after reaching rough water, it became apparent that the boat was in great danger, and she swamped, and some of the passengers were drowned, the officer was chargeable with gross negligence, for which the ship is liable; and the contributory negligence of the passengers, if conceded, constitutes no defense to such liability, under the rule that such negligence will not defeat the action when it is shown that defendant might, by the exercise of proper and reasonable care, have avoided the consequences thereof.

2. SAME—LIMITATION OF LIABILITY—PRIVITY OR KNOWLEDGE OF SHIPOWNER.

Where the president of a steamship company was present in a small boat sent ashore by one of the company's ships, and acquiesced in the

¶ 2. Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.

action of the officer in charge in negligently permitting the boat to be overloaded, in consequence of which it was swamped, and a number of the passengers were drowned, such negligence of the officer was with "the privity or knowledge" of the company, which is not entitled to a limitation of its liability for claims arising out of the disaster, under Rev. St. §§ 4283-4285 [U. S. Comp. St. 1901, p. 2944].

Appeal from the District Court of the United States for the Northern District of California.

For opinion below, see 123 Fed. 838.

M. M. Wright, for appellant.

Nathan H. Frank, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. In September, 1900, the steamer Albion, owned by the appellee, Kimball Steamship Company, was anchored in Golovin Bay, Alaska, about a mile and a half from the beach; and, being ready to proceed on a voyage from that place to San Francisco, one of her small boats was sent, in charge of her second officer and two sailors, to the shore, to bring to the steamer such persons as intended to take passage on her. In returning, the boat capsized, and some of the passengers were drowned—among them, Louis G. Weisshaar. Of his estate Ella M. Weisshaar was afterwards appointed administratrix, and as such administratrix she commenced an action at law in the superior court of the city and county of San Francisco, state of California, against the appellee, for the recovery of damages in the sum of \$40,000 for the death of her husband. That action had not been tried, but was at issue, when the appellee filed in the court below its petition, by virtue of sections 4283-4285 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2944], for the purpose of contesting its liability for any damage or injury growing out of the accident, and for the purpose of limiting its liability in the event of being held responsible. In its petition the petitioner alleged that the overturning of the boat—

"Was in no way caused by fault or negligence on the part of the master or the crew of said steamer Albion, or any of them, and that the loss, damage, and injury, if any, thereby done, occasioned, or incurred, were without fault on the part of your petitioner, and without its privity or knowledge, but that the fault of the said swamping and overturning was due entirely to the acts and conduct of the passengers in said boat, in standing upon their seats in said boat and causing her to overturn, combined with inevitable accident occurring by reason of the condition of the wind and wave at the time of said swamping and overturning; that nevertheless certain persons have made claims against petitioner for losses arising out of said swamping and overturning, which said claims are for alleged loss of life of some of such passengers, and alleged loss of baggage so being transported as aforesaid; that among said claims is the claim of Ella M. Weisshaar, as administratrix of the estate of Louis G. Weisshaar, deceased, which said Louis G. Weisshaar is claimed by said claimant to have been one of the passengers so carried on said boat, and so drowned by reason of said swamping and overturning; that other claims have been asserted against your petitioner, and that other claimants have threatened to file libels against said steamer or to bring actions against your petitioner; and that your petitioner apprehends and is in fear that other claims in addition to those set forth will be presented against it, or said steamer Albion, by other

parties who may have sustained loss, damage, or injury by reason of the matters and things hereinbefore set forth."

It is further averred in the petition that there was freight pending by reason of the trip on which the steamer was engaged at the time of the accident, amounting to \$2,265; that the value of the steamer at the close of the voyage did not exceed \$15,000, and that the amount of the claims already presented, and as apprehended and threatened, far exceeds the value of the steamer and the pending freight; that there is no lien on the steamer prior or paramount to any lien that may have attached by reason of the matters alleged.

The value of the steamer and the freight pending were duly appraised, and the administratrix of the estate of the deceased, Weisshaar, answered the petition, putting in issue its material averments, and presenting a claim for damages for the drowning of her husband. In its opinion, the court below said:

"It sufficiently appears from the evidence that Louis D. Weisshaar was one of the persons drowned. It also appears that the boat upon the occasion referred to carried a greater number of persons than allowed by law, and also some baggage. It was down by the head, and so much overloaded that it had but little freeboard, and, in consequence thereof, as soon as the rough water of the bay was encountered, filled with water and capsized. Before it left the beach, the second mate of the Albion, who was in command of the boat, notified those who were in it that it was overcrowded, and asked some of them to get out and wait until the boat should return for them. Some of them did go ashore, but, assured by one of the passengers that there was room in the boat for more, most of them came back again; the officer still protesting that it was overcrowded. Such, in substance, is his testimony, and in this he is, to some extent, corroborated by Carville and De Lay, two witnesses whose depositions were offered in evidence by the claimant. The deceased had not actually engaged passage upon the steamer, but was going aboard for that purpose." 123 Fed. 838.

The court below very properly held that the petitioner, having undertaken to convey the deceased to the steamer for passage thereon, was under the same obligation to use proper care in transporting him as if he had paid for or engaged his passage in advance. The court below, however, further held that the deceased was guilty of contributory negligence in remaining in the boat after he and the other passengers therein were notified by the officer in command; that, "in so remaining, the deceased, as well as the other passengers in the boat, assumed the risk resulting from its overcrowded condition, and voluntarily encountered a danger which a prudent man with notice would have avoided." The court accordingly dismissed the claim of the administratrix of the estate of the deceased, Weisshaar, and entered a decree to the effect that the petitioner is not liable for damages growing out of the overturning of the boat.

The evidence shows that the capacity of the boat was 14 persons, without baggage. At the time of the accident in question it contained 18 persons, a trunk, 2 tool chests, and 3 or 4 sailors' bags. The boat was in charge of the second officer of the ship, who had under him two sailors, and, when ready to receive its passengers was stranded, with its bow well up on the sands of the beach. The evidence shows that the deceased, Weisshaar, was the fifth man to enter the boat, and took his seat about amidship. He had been preceded by a Capt. Tyson, and

by the president of the appellee steamship company, Mr. Marsden. In his direct examination the ship's officer in command of the boat was questioned and answered as follows:

"Q. State what happened at the shore before you left there, with respect to the passengers getting in, and your protesting, and whatever else happened? A. The passengers crowded into the boat, and I told them that 'this boat only holds fourteen passengers.' After some talk, five or six passengers went out of the boat, and went on the beach again. I was just going to leave, when Mr. Tyson sang out: 'There is lots of room. Come on, boys.' He mentioned a few names. Joe Corbell was among them. He says, 'There is lots of room.' Those passengers had left the boat, and I heard them say, 'I don't think we will lose our fresh-meat supper,' and they rushed into the boat the second time. Q. What did you do? A. I told them it was risky. The boat was overloaded, and there were three men left on the beach. I said: 'I have to go back to the beach and make another load. You might as well wait.' They laughed at me and told me I was a coward; that I was scared. I said: 'Well, boys, it is smooth water alongside the beach, but it will not be outside 20 or 30 yards. It will be rough. You had better do as I tell you.' They just laughed at me, and said I was afraid, and pushed the boat out, and out they went."

At the end of his direct examination this witness was asked, "Did you have any means or power to prevent them?" to which question he answered: "I had no power whatever. I was powerless. They took the command away from me, and took control of the boat, and I could not do nothing."

A careful perusal of the entire testimony of this witness, of itself, shows that there was no justification whatever for his statement that the boat was started on its perilous journey against his protest, or that the control of it was taken from him by the passengers. If powerless in the premises, it was only because he did not have the stamina to assert and exercise the authority with which he was clothed, and which the law and good seamanship made it his imperative duty to enforce. The evidence is overwhelming not only that he made no objection to starting the boat with its overload, but that, according to his own testimony, one, at least, of his own sailors took an active part in shoving it off the sand and into a floating condition, which appears without conflict to have been a matter of considerable difficulty; so much so that several of the passengers had to assist the sailors in accomplishing it—some by means of oars, and others, having high boots, by getting into the water and pushing the boat.

Let it be assumed that, when the officer announced that the boat was overloaded and that it was "risky," it became the duty of all the passengers to get out—as well those who had entered when there was ample room as those who had caused the overloading—and that every one who remained thereupon became guilty of contributory negligence; such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip, but, after starting, and while it was yet in smooth water, and after observing that it was down by the head, and with but little freeboard, made no effort whatever to return to the shore to make the boat safe by discharging some of the passengers. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat's complement of men. According to his own testimony, he made

nothing more than a milk and water protest against the entry of any one; and even if there had been on the part of the passengers an effort to overpower the officer and force their way into the boat—of which there is not the slightest evidence—it still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe. Not the slightest attempt appears to have been made by this officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to shore while he yet had sufficient opportunity, the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Louisville & Nashville Ry. Co. v. East Tennessee, V. & G. Ry. Co.*, 60 Fed. 993, 9 C. C. A. 314; *Harrington v. Los Angeles Ry. Co.* (1903, Cal.) 74 Pac. 15.

This doctrine, which is well established, fits the present case exactly. The case of *Lynn v. Southern Pacific Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710, is, in principle, also precisely in point. In that case the plaintiff passenger was unable to find room inside a car, and therefore stood upon the platform, from which he was thrown and injured; the evidence tending to show that the train was going at excessive speed. In affirming a judgment for the plaintiff, the Supreme Court of California said:

"The defendant should not have allowed so many passengers to have gone upon its cars, and, if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances; but, if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platforms, it was under obligation to exercise the additional care commensurate with the perils and dangers surrounding the passengers by reason of the overcrowded condition of the cars."

So, here, as has already been said, if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to. But speculation on that point is no answer to the gross neglect of duty on the part of the officer of the ship.

Moreover, the evidence shows that the negligence of the officer in command of the boat was committed in the personal presence and within the actual knowledge of the president of the appellee corporation, who, so far from seeking to enforce the performance of his duty by that officer, acquiesced in his neglect of duty, as affirmatively appears from the president's own testimony.

The limitation of liability provided for by the statute under which the present proceedings were had is, according to its express terms, to be allowed only when the loss, damage, or injury occurs "without the privity or knowledge" of the owner. In the case of *The Republic*, 61 Fed. 109, 9 C. C. A. 386, the privity or knowledge of the corporation consisted in the negligence of its president, who, by his omission of

proper care in his examination of the vessel, failed to discover her defective condition; and the Circuit Court of Appeals for the Second Circuit there held that the injuries and death occasioned to the excursionist in that case could not be said to have occurred "without the privity or knowledge" of the owner. We think that decision directly in point here. "Privity and knowledge," said Judge Brown in *The Colima* (D. C.) 82 Fed. 665, "are chargeable upon a corporation, when brought home to its principal officers or the superintendent, who is its representative." See, also, *Quinlan v. Pew*, 56 Fed. 111, 5 C. C. A. 438; *Lord v. Goodall, etc.*, S. S. Co., 4 Sawy. 292, Fed. Cas. No. 8,506.

The judgment is reversed and cause remanded, with directions to the court below to dismiss the petition at petitioner's cost, leaving the administratrix of the estate of the deceased, Weisshaar, at liberty to pursue her action for damages in the state court.

(128 Fed. 402.)

THE HELEN G. MOSELEY.

MOSELEY et al. v. ROB. M. SLOMAN & CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1904.)

Nos. 72, 73.

1. COLLISION—STEAMER AND SCHOONER CROSSING—INEFFICIENT LOOKOUT.

A collision occurred at sea in the night between a steamer and a schooner on crossing courses. The night was clear and the wind light, but it was shown that the schooner had steerageway, and that her lights were burning and of more than usual size. While the evidence as to her course was conflicting as between the witnesses from the two vessels, it did not sustain the contention of the steamer that she was on such a course that her lights could not be seen in time to have prevented the collision, although the steamer's lookout and three of her officers testified that they were watching, and did not see the lights until immediately before the collision. *Held* that, under such evidence, the steamer, as the burdened vessel, must be held solely in fault.

2. SAME—INCONSISTENT TESTIMONY OF SAME WITNESSES.

Where the testimony of the crew of a schooner as to her course before and at the time of a collision, and as to the bearing of the light of an approaching steamer with which the collision occurred, cannot be correct in both particulars, or the collision could not have occurred, assuming the witnesses to be honest, the testimony as to the course is entitled to preference, as less liable to error.

Appeals from the District Court of the United States for the Eastern District of New York.

These causes come here upon appeals from decrees of the District Court, Eastern District of New York, holding the steamer *Albano* solely in fault for a collision with the schooner *Helen G. Moseley*, which occurred about 1 a. m. September 10, 1901, off Tucker Beach, N. J.; the steamer being bound from New York to Newport News, and the schooner from *Fernandina* to New York. The night was dark, but good and clear for seeing lights. The wind was light from about the southwest. The day before, there had been a strong breeze from the N. E., and there was still an easterly sea bearing in. The *Albano* was about 380 feet long, and her bridge was located about amidships. The schooner was three-masted, about 150 feet long, and 566 tons register. The opinion of the District Court is reported in 117 Fed. 760, and may be referred to for facts not hereinafter restated. The testimony of the most important witnesses was taken by deposition.

Harrington Putnam, for appellants.

Edward E. Blodgett, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The claim of the schooner is that she was on a course of N. E. by E. (having changed to that course from a N. E. one about midnight), with the wind directly astern, and sailing with her sails winged out—i. e., head sails trimmed in, foresail hard amidships, mainsail on the port side, and spanker on the starboard side—and going two or three knots. A bright light was first seen by the lookout, and reported to the mate, who was in charge of the navigation, and was at once seen by him. It bore about three points on the port bow, and a little later the green side light of the steamer was seen bearing in about the same direction. It was expected that the steamer would change her course and keep clear, and the schooner held her course. The steamer came on without apparent change, and collided with the schooner, striking her on the port bow at an angle of about four points.

The steamer's story is that she was on a course S. W. by S. when the lookout reported a red light ahead. The second officer, who was in charge of the navigation, and others on the bridge at the same time, saw the loom of sails slightly on the starboard bow, but very close aboard, with a small, dim, red light, apparently heading to the southeastward. The Albano's helm was instantly put hard astarboard, her engines stopped, and put full speed astern; but so close was the schooner that the wheel was barely over, and the Albano had not swung off as much as a point, when her starboard bow was struck a square blow by the schooner's stern.

From the narrative of neither side is there any warrant for holding this to be a case of inevitable accident. There was fault somewhere. The Albano, being a vessel under steam, was bound to keep out of the way of the schooner under sail, and, having failed to do so, can excuse herself only by showing fault on the part of the schooner. Manifestly the proximate cause of the accident was the failure of those on the steamer to discover the red light of the schooner until she was within one length of them. Judging from the event, the navigator of the steamer would have used better judgment, had he at once ported to the schooner's red light, but that bit of navigation came so close to the collision that it need not be considered. The brief moment left in which to navigate was primarily responsible, and its briefness was the result of failure to make out the schooner earlier. The second officer was in charge of the steamer's navigation. The boatswain was on the bridge with him, performing there the duties of a junior officer. The quartermaster had served in the German navy; the lookout, in the German army. All were experienced men, and had undergone special eyesight examination. The captain was also on deck, but he had returned so recently after a momentary absence in the chartroom to work out an observation, taken to ascertain location off shore, that he should not be counted among the watchers for lights. It is difficult to understand how such a body of officers and men, at the beginning of their watch, could have failed

to see the red light earlier, if it had been visible. The circumstance that it was lower than the plane of observation of the lookouts, that there was still an easterly sea, that several other lights had recently been seen and kept under observation, thus tending to distract attention, seem hardly sufficient to account for a temporary aberration, lasting some minutes, on the part of four competent observers simultaneously. Nevertheless individual aberrations of sight and attention do occur, even among the ordinarily careful, and, however enormous the odds may be against such a simultaneous occurrence among four persons, the combination is possible. Therefore, under well-settled principles, unless there can be shown some cause, due to the schooner, why her red light was not shown to the steamer until in the very jaws of the collision, the conclusion must be that the steamer was in fault.

When the libel was filed and the proofs were taken, it was intimated that the red light had not been lit until just before the steamer sighted it; and effort was also made to show that the light was a dim one, of insufficient size. The testimony, however, shows conclusively that the light was a proper one, of more than regulation size; was properly set and properly burning. This testimony need not be discussed, because on this appeal no question is made of the sufficiency of the light. Nor is there any contention in this court that either the head sails or anything else obscured or hid the light. The only proposition now relied on by the steamer is that the schooner was heading S. E., or so far to the south of east that the steamer was in reality approaching her abaft the range of her lights, and that some slant of wind or a freshening land breeze brought the schooner far enough around to the east again just before collision to show her regulation side light—not its full surface flame, but only a glimmer of the edge rays shining backward as the surge of the sea swung the schooner over to port. If this were so, not only was the failure to see her red light not a fault, but the schooner herself would be in fault for not exhibiting a flare-up light or a torch to the vessel approaching abaft her beam.

The only question to be examined, therefore, is, on what course was the schooner sailing? She insists it was N. E. by E. The steamer contends that it was S. E. The District Court reached the conclusion that her heading was "E. by S., or E. S. E., or E. S. E. $\frac{1}{2}$ S." Since neither of these three courses would bring the steamer abaft the range of the schooner's lights, the District Court held her in fault for failure to discover the red light sooner.

There is a wide discrepancy—seven points, nearly a right angle—between the courses contended for by the respective parties. Such a difference of course in a vessel propelled by sails might be expected, under certain conditions of wind, to produce changes in the position of the sails. The first thing to do is to see which of the suggested courses most nearly harmonizes with the testimony in the case. Some facts are here undisputed. The course of the steamer was S. W. by S. The schooner had steerageway and was going about two knots. Her witnesses so testify, and the second officer and the captain of the steamer both admit that she had way enough

for steering. Whatever may have been the condition of the weather earlier in the night, there is no proof to sustain the contention made in argument that just before the collision the schooner was drifting, not sailing. As the vessels approached, the schooner bore on the starboard bow of the steamer. All the witnesses from the schooner say they saw the Albano's green light, and all the witnesses from the Albano saw the schooner's red light on their starboard bow.

A course of S. E. would be an extraordinary one for a sailing vessel with a southwesterly wind, bound from where she was to New York. Her correct course would be, as she claimed, about N. E. by E. There should be a distinct weight of persuasive evidence to warrant the conclusion that she was so far off her course as the steamer contends she was. The District Judge has discussed the evidence, and made careful calculations of the headings of the vessels at different times. It is not necessary to quote. His opinion may be consulted. The calculations are accurate if all the factors which enter into them are correctly found. It was assumed, or, rather, deduced from disputed testimony, that the angle of collision was nearly a right angle—fully seven points—and that the steamer, when sighted by the schooner, bore three points on the latter's port bow.

As to the angle of collision, all the witnesses from the steamer give it as about seven points, or nearly a right angle. It should be noted, however, that none of them saw the schooner until a few seconds before collision; that they then believed she was crossing their own course at about a right angle; that this belief was induced by the loom of her sails as they came into view, apparently on the port side of the schooner. "I was right into them broadside," says the second officer of the Albano. "* * * I was of opinion that she was bound to the southward." It may be assumed that some, at least, of the witnesses from the steamer, deduced their conclusion that the heading of the schooner at collision was such as to make a seven-point angle, from the appearance of her sails spread broadside in front of them. The master of the schooner and one of the watch below, both of whom hurried on deck in response to the warning of an imminent collision, agree with the steamer's witnesses. The view of the schooner's wheelsman was obscured by the sails, and he gives no estimate, while her mate and lookout give the angle at three to four points; and, of the two surveyors who examined the wound, one, called by the steamer, admitted the blow might have been an angling one, and the other, called by the schooner, estimated the angle of collision at two to three points. The testimony from the schooner is uniform that she was winged out during the former watch, which ended at midnight. This is inherently probable, because, with a southwesterly wind, it was proper navigation to make her destination. Moreover, her testimony is to the effect that during that watch her main boom and spanker boom were both fastened out with tackles, so that the booms should not swing back and forth. This also was proper seamanship, and the testimony is inherently probable. Her witnesses also testify that those tackles were not touched after the new watch began, down to the time of collision. Inasmuch as the wind did not shift more than a point during this

period, there is no conceivable reason why the tackles should have been disturbed; and we are fully persuaded that at the time of collision, whatever her heading may have been—whether it was still nearly N. E. by E., or had dropped down more to the southward—her after sails were still winged out. Appellants' counsel has inserted in his brief two lithographs which admirably illustrate the different appearances presented by the sails of a schooner when she looms through the darkness of night, at an angle of about two points, and also at a right angle. The second one represents a vessel on the starboard tack with her sails to port and trimmed in. If the obscurity were a shade greater, and the after sails were winged out, so that the observer saw them end on, the effect would be different; and there is some weight in the argument of the appellees that the observers from the Albano might, in the darkness, have been deceived by the winged-out sails, towards which they seemed to be approaching broadside, into the belief that they were encountering a vessel crossing their course at right angles. The weight of direct evidence is in favor of the conclusion that the collision was at a seven-point angle, but not so strongly as to require the discarding of some other proposition inconsistent with such result, but established by more convincing evidence.

As to the bearing of the steamer: The District Judge says:

"The crew of the schooner state that she was headed N. E. by E.; that the steamer's white light, and later her green light, bore three points on the schooner's port bow; and that the steamer did not change her course. With such heading of the schooner and bearing of the steamer, the accident could not have happened, and the red light not the green light of the steamer should have appeared."

This is correct, and is made very clear by a diagram in appellants' brief. But it is certain that it was the steamer's green light which appeared. Not only do the schooner's witnesses so testify, but all the steamer's witnesses concur in the statement that the schooner appeared off the Albano's starboard bow. It is quite plain that the statements of the schooner as to both course and bearing cannot stand. Which one is to be rejected? Apparently the one which is most liable to error, and whose elimination will make the harmonizing of the remaining testimony most easy. As to the course of N. E. by E., the lookout, Ommundsen, who came on watch at 12 o'clock, merely says the schooner was going before the wind. Normand, who had steered in the prior watch N. E. by E., turned the wheel over at 12 o'clock to Hornsley, and gave him that course. Hornsley, the wheelsman, said he was given this course of N. E. by E., and that he steered it. Keiley, the mate, says that when he came on deck, at 12 o'clock, he "altered the course to N. E. by E.," and that such course was held.

As to the bearing of the steamer's light: Ommundsen, lookout, says "it was pretty near ahead; about three points on the port bow." Hornsley says it was "about two or three points on the port bow." Keiley says "about three points on the port bow." Now, in the testimony as to course, assuming the witnesses to be honest, there is one source of error, viz., defective memory. The witnesses testify

to facts, not to opinions. The man who gave an order, the man who heard it, the man who watched the compass card, all testify to their recollection of absolute facts. On the other hand, the testimony as to bearings is exposed not only to error resulting from imperfect memory, but also to error from careless or unskillful estimates. The witnesses testify to their recollection of an opinion formed by them, which opinion may not originally have been an accurate one. Upon the whole, it might well be supposed that the schooner's testimony as to her course should prevail over her testimony as to the varying estimates of her watch as to bearings. And this is confirmed by a bit of testimony given by the mate. It was brought out on cross-examination that, when he first made the steamer's light, he took its compass bearing, and found it "just about N. E." That would be one point off the port bow, and with that bearing the collision might have happened as the schooner's witnesses describe it, except that the angle of collision would be much acuter than seven points.

On the whole, we find great force in the argument that the angle was not more than three points, and that the schooner's course was as she claims. Such findings would reconcile the other testimony in the case. But we need not go so far. We are entirely satisfied that the evidence fails to show that the schooner was heading so much to the south of her course as to obscure the steamer's view of her red light. That is the conclusion reached by the District Judge.

The decrees are affirmed, with a single bill of costs and interest on the decree against the Albano.

(128 Fed. 407.)

MEXICAN NAT. R. CO. v. PALMER.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904.)

No. 1,287.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—ISSUES—BURDEN OF PROOF—REQUESTED INSTRUCTIONS.

Where, in an action for injuries to a Pullman porter in a railroad wreck, whether he was injured at all in the wreck was in issue, and the evidence thereon was strongly conflicting, defendant was entitled to a charge that the burden was on plaintiff to establish by a preponderance of the evidence, to the jury's satisfaction, the derailment of the train on which plaintiff was serving as a porter, and that he was injured in the manner alleged in his petition, and that if he had failed to so establish either of such propositions as alleged he could not recover.

2. SAME—INSTRUCTIONS GIVEN.

Such instruction was not covered by a charge that the accident was alleged to have happened at a particular point on defendant's road; that plaintiff in his petition claimed that the derailment of the coach in which he was riding was caused by defendant's negligence in running the train at an excessive and dangerous rate of speed, and by the defective condition of defendant's track at the point where the accident occurred; that if plaintiff's injuries resulted from either of these causes, or both combined, defendant would be liable; and that the burden was on plaintiff to prove his case as alleged; together with a subsequent charge that in civil cases, like the present, the jury were entitled to predicate their finding on a preponderance of the evidence.

In Error to the Circuit Court of the United States for the Southern District of Texas.

Thos. W. Dodd, for plaintiff in error.

E. A. Atlee and Chas. H. Bertrand, for defendant in error.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

NEWMAN, District Judge. This case is here on writ of error from the Circuit Court for the Southern District of Texas. The case in the court below was a suit by Frank Palmer against the Mexican National Railroad Company for damages for injuries which he alleges he received by the derailment of a train on the Mexican National Railroad in the Republic of Mexico, and near the station of Maravatia, on said road. On the trial of the case the plaintiff obtained a verdict, and judgment was entered thereon.

Frank Palmer, the plaintiff, was a porter on a Pullman car called "La Gitana." The train consisted of the engine and tender, baggage car, three Pullman cars, and two ordinary coaches, second and third class. The "Matamoras" was the front sleeper next to the baggage car, "La Paloma" was next, and "La Gitana," on which the plaintiff was porter, and on which he was riding, was third. The two ordinary coaches were in the rear. The cause of the accident, it appears, was a broken rail, although it is not material to the issue here what caused it. It seems that the engine and baggage car passed over the broken rail, but the "Matamoras" and "La Paloma," the two front sleepers, were derailed. "La Gitana," in which the plaintiff was riding, was not derailed, although its platform was broken in the accident. The plaintiff says that "the trucks that the front part of his car mounted had left the rail, and that is what stopped the car."

The plaintiff, according to his testimony, at the time the accident occurred, was sitting on a stool in the aisle at the front end of the sleeper. He was near a window, and near a swinging door between the main portion of the car and the ladies' toilet room. In his direct testimony plaintiff says that "it gave a quick jolt, and threw me off my seat, and threw this leg through the window (indicating his right leg)." On cross-examination he said: "The sudden stopping of the train threw my leg through the glass that is in the inner door that one goes through to go to the ladies' toilet room. The glass must be two and a half feet from the floor in the door. The door is on automatic hinges, that it opens either way; backward or forwards." The plaintiff offered evidence of two physicians to show that he had a badly ulcerated leg. Neither of the physicians stated the cause of the condition of plaintiff's leg, but substantially stated that it could be the result of an injury such as plaintiff claimed to have received. One of the physicians first examined plaintiff in June, 1901, and the other first examined him in July, 1902.

While the plaintiff's petition alleges that the accident occurred on February 4, 1901, it seems really to have occurred on January 4, 1901. Plaintiff's suit was commenced on the 25th of February, 1902.

The defendant offered evidence tending to show that plaintiff made

no complaint of any injury on the night of the accident, or the next morning, and gave no evidence of injury.

Part of the testimony of the conductor of the Pullman cars was as follows :

"My duty was to see what damage was done, and make a report of it. I examined the car carefully, and there was no damage to the car except the front platform. I made a damage report of that train, and turned it in. I examined the door that swings on automatic hinges, and the glass in that door, and the whole body of the car, and there was no broken glass in that door or in the car at all."

It will be seen from the foregoing that a clear issue was made in the case as to whether the plaintiff was injured as claimed.

Defendant's counsel requested the court in writing to charge the jury as follows :

"The jury are instructed that the burden of proof is upon the plaintiff to establish, by a preponderance of the testimony, to your satisfaction, (1) the derailment of defendant's train, upon which the plaintiff was serving as a Pullman porter; (2) that he was injured in the manner alleged in his petition; (3) if the plaintiff has failed to establish the derailment, and his injuries as alleged, or either the derailment or his injuries, by a preponderance of the evidence, you will return a verdict in favor of the defendant company."

This written request to charge the court refused.

The part of the charge of the court as given, so far as it relates to the burden of proof being on the plaintiff, is as follows :

"The accident out of which the suit arose is alleged to have happened at a point on the road of defendant within a few miles of the station of Maravitia, in the Republic of Mexico. In his petition plaintiff claims that the derailment of the coach in which he was riding was caused by the negligence of defendant's employes in running the train at an excessive and dangerous rate of speed, and by the defective condition of defendant's track at said point, and the burden is upon him (the plaintiff) to prove his case as alleged."

In concluding his charge, the court in addition said this :

"In civil cases, such as the present one, you may predicate your finding upon a preponderance of the evidence."

The learned judge in the court below probably refused the request of defendant's counsel to charge as indicated above, for the reason that it was believed to have been covered by the general charge as quoted. We do not think so. The charge as given, so far as it puts the burden on the plaintiff, clearly did so with reference to the cause of the accident. The language used confines it to this. We think, fairly interpreted, that this instruction refers only to the plaintiff's claim that the train was running "at an excessive and dangerous rate of speed," and that the track was in a "defective condition," and then puts the burden upon the plaintiff to prove those causes of derailment as alleged.

The conclusion that the court did not intend to apply this part of the charge to the matter of injury is strengthened by the fact that in the next paragraph of the charge it seems to be assumed that the plaintiff was injured as alleged. The opening sentence of the paragraph is: "If the injuries of plaintiff resulted from either one of these causes, or both combined, the defendant would be liable, and your verdict should be against it."

The last paragraph of the court's charge, to the effect that "in civil cases, such as the present one, you may predicate your finding upon a preponderance of the evidence," cannot be claimed in any sense to cover the defendant's request.

A distinct issue was made on the trial of this case as to whether the plaintiff was injured as claimed, and in the manner claimed, by this accident. Consequently the defendant was entitled to have the court instruct the jury specifically, as requested, that the burden was on the plaintiff to show that he was injured in the manner alleged. We are not unmindful of the well-recognized rule that when a specific request has been really and substantially covered by the general charge there is no duty on the court to give such request; this being especially true when the request would tend to emphasize unduly a particular feature of the case. In this instance, however, we think the rule inapplicable, for the reasons which have been stated. In view of the direction given to this case, we refrain from any further comment on the evidence. Such mention of it as has been made was only for the purpose of showing the existence of an issue rendering pertinent the instruction requested for the defendant.

An exception having been saved by the defendant to the refusal of the court to charge as requested, we are constrained to hold that the same was well taken.

The judgment of the court below is reversed, and the case remanded, with directions to grant a new trial.

(128 Fed. 410.)

MUNICH ASSUR. CO., Limited, et al., v. DODWELL & CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1904.)

No. 975.

1. MARINE INSURANCE—INSURABLE INTEREST OF CHARTERER IN CARGO.

The charterer of a steamship has an insurable interest in goods in his possession as carrier to the full extent of their value against a loss for which it is possible that he may become responsible, and the question whether he has a right to recover on the policy is not to be determined after the loss by inquiring whether he is in fact then liable to the owners on account of such loss.

2. SAME—GENERAL AVERAGE LOSSES ON CARGO—CONSTRUCTION OF POLICY.

A marine policy issued to the charterer of a steamship insuring the cargo against general average charges, "as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all," is to be construed as covering the entire cargo in the vessel, whether owned by the charterer or by others, and the charterer is entitled to recover thereon the full amount of general average charges apportioned against the cargo.

Appeal from the District Court of the United States for the Northern District of California.

For opinion below, see 123 Fed. 841.

¶ 2. Marine insurance, general average, see note to *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 357.

Andros & Hengstler, for appellants.

Page, McCutchen & Knight, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. Dodwell & Co., Limited, a corporation, the appellee, was the charterer of the steamship Tacoma, and as such charterer it received on board a cargo of merchandise for transportation from Seattle to Nome, Alaska. Part of the cargo belonged to the appellee, but the greater portion thereof belonged to various shippers, to whom as a carrier it issued bills of lading. The appellee thereupon obtained from the Munich Assurance Company, Limited, the appellant herein, insurance on cargo valued at \$100,000 in the steamship Tacoma, at and from Seattle to Nome, "against general average and salvage only." The policy insured "Dodwell & Co. as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." It was not shown that the other owners of the goods authorized the insurance or ratified the same. On the voyage, owing to the stranding of the vessel in Behring Sea, a jettison of a part of the cargo became necessary. The loss of the owners of the jettisoned cargo became chargeable to the ship, freight, and cargo in general average. The appellee paid to the owners of such cargo the general average share, due from the goods which it owned, and paid them also the contributions due from cargo belonging to other owners. To recover the amount thus paid to the owners of the jettisoned cargo the appellee brought the present suit upon the policy of insurance. From a decree of the District Court adjudging it entitled to the full amount thus paid, the present appeal is taken.

The appellant admits that the policy covers the amount of the general average contribution paid by the appellee on its own goods on board the steamship, but contends that it is not liable under the policy for the amount of the contributions chargeable to the goods of which the appellee was not the owner, for the reason that the latter had no insurable interest therein. It is argued that as a common carrier or bailee the appellee could insure goods in its possession only against a risk which would expose it to loss or liability. There are some expressions found in the text-books which lend color to this view. Thus, in Gowan on Marine Insurance, 311, it is said: "The liability for general average on the policy of insurance cannot be greater than that of the assured on the contract of affreightment." And in Wood on Fire Insurance, § 294, concerning the insurable interest of a common carrier, it is said: "But his right to recover beyond the extent of his own interest must depend on the circumstance whether he is liable to the owner for the loss." To sustain that doctrine the author last mentioned cites *Seagrave v. Union M. Ins. Co.*, L. R. 1 C. P. 305, and *London, etc., Ry. Co. v. Glyn*, 1 El. & El. 652. But if by the language of the text-book so quoted it is meant that the right of a carrier to recover beyond the extent of his own interest must depend on the question whether he is actually liable to the owner for the loss after it has occurred, it announces a doctrine not supported by the decisions referred

to or by other authority. The case first cited goes no further than to hold that the insured had no insurable interest for the reason that the insurance was obtained by a nominal shipper and consignee of the goods, who was a mere agent having no lien upon the goods for advances, commissions, or otherwise, nor the possession or custody of them as carrier, factor, warehouseman, or other bailee, nor any liability to account for their loss by the perils insured against. In the second case the insurance was obtained by carriers upon "goods their own and in trust as carriers." The court sustained the insurance contract, and the learned judges who composed the bench each expressed the view that the fact that the insured were not liable to the owners "does not at all affect the case." After a careful investigation of English and American decisions, we think the true doctrine is that a carrier has an insurable interest in goods in his possession as such, to the full extent of their value, against a loss for which it is possible that he may become responsible, and that the question whether he has the right to recover under the policy is not to be determined after the loss by inquiring whether in fact he is then liable to the owners of the property for the value thereof or for damage thereto. In the present case the appellee insured against general average. It is undoubtedly true that it might have become liable to the owners of the goods for loss on general average resulting from its own negligence in navigating the steamer. It may have been so liable in this case, for aught that the record discloses to the contrary. It had the right to insure against its own negligence as well as against the necessity of being required to enter into the inquiry whether its own negligence caused or contributed to the stranding of the vessel, the jettison, and the resulting general average charges.

In *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, 323, 6 Sup. Ct. 755, 29 L. Ed. 873, the court said:

"Any one who has made himself responsible for the safety of goods has a sufficient interest in them to enable him to obtain insurance upon them.
* * * So a common carrier, a warehouseman, or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value, and the policy need not state the nature of his interest."

The opinion cites with approval *Crowley v. Cohen*, 3 B. & Ad. 478; *London & Northwestern Ry. Co. v. Glyn*, 1 El. & El. 652; *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; and other cases. In *Crowley v. Cohen* the insurance was obtained by carriers upon goods, and upon tackle, etc., on 30 canal boats. The question was raised whether the interest of the insured was sufficiently described. The court was of the unanimous opinion that it was. *Littledale, J.*, said:

"Goods in the custody of carriers are constantly described as their goods in indictments and declarations in trespass. The plaintiffs here were liable in particular cases for the loss of the goods they carried, and had a special property in them on that account. The goods were for the present purpose their goods."

In *London, etc., Ry. Co. v. Glyn* the insurance was upon "goods their own and in trust as carriers." The purport of the decision in that case has already been referred to. *Savage v. The Corn Exchange Co.* was

a case in which the carrier insured against any loss or damage he might sustain "on cargoes on account of himself or others." The court said:

"The plaintiff was a common carrier, and received the goods for transportation. As such he was bound to make safe delivery at the place of destination, unless excused by the act of God or the public enemy. His obligation to the owner of the cargo, as well as his interest therein for advances and freight, vested in him an insurable interest to the extent of the fair value of the property covered by the contract of indemnity."

Other decisions are of similar import. In *Waters v. Monarch Assurance Co.*, 5 El. & Bl. 870, it was held that a warehouseman, whose responsibility for goods intrusted to his charge is of a lower degree than that of a carrier, had an insurable interest in goods in his possession, "although he is liable only for his own negligence to the owner." In *Baxter v. Hartford Fire Ins. Co.* (C. C.) 12 Fed. 481, Judge Gresham held that a commission merchant operating a grain elevator had such an interest in the grain deposited with him by others as to authorize him to insure it for its full value against loss by fire, notwithstanding that the contract between him and the depositors of the grain stipulated that fire was at the owner's risk. In *Waring v. The Indemnity Fire Ins. Co.*, 45 N. Y. 606, 611, 6 Am. Rep. 146, the court said:

"Agents, commission merchants, or others having the custody of, and being responsible for, property, may insure in their own names; and they may, in their own names, recover of the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. * * * The right is put upon the fact that, having the possession of the property exclusive as to all but the owner, to whom they are responsible, they have the right to protect it from loss, so that it or its value may be rendered to the owner when he calls for his own."

In *Eastern Railroad Co. v. Relief Fire Ins. Co.*, 98 Mass. 420, 423, the court said:

"A common carrier has an insurable interest in the goods carried by him, which he may insure to their full value without regard to his liability to the owner of the goods."

In *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72, a policy of fire insurance was issued to a common carrier upon "any property upon which they may be liable in freight building or yards." It was held that the policy covered merchandise belonging to other parties for which the carrier was liable as a common carrier, although other common carriers were by contract bound to indemnify it for all loss thereon. So, in *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 543, 23 L. Ed. 868, it was held that warehousemen having goods in their possession "may insure them in their own names, and in case of loss may recover the full amount of insurance for the satisfaction of their own claim first, and hold the residue for the owners." In *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 409, 10 Sup. Ct. 365, 33 L. Ed. 730, the court announced the same doctrine. The underlying principle of all of these cases is that a possible liability of the carrier may result from the risk insured against, and that this creates an insurable interest.

It is contended, further, that the policy by its terms covers only the interest of the appellee in the cargo, and that there is nothing therein to show that the insurance was to cover other goods. It must be assumed that the insurer was aware that the charterer was a common carrier. By its policy it undertook to insure cargo valued at \$100,000 in the steamer Tacoma. It did not undertake to insure the appellee in its own right only. It expressly stated in the policy that it insured the appellee as well in its own name "as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." These are comprehensive words, and clearly import that the insurance was to cover the whole cargo in the steamer, whether belonging to the appellee or to others. The appellant contends, however, that this language of the policy is no more than the equivalent of the phrase, frequently used, "on account of whom it may concern," and that it has the effect to limit the insurance to the insured and to those to whom he may transfer the property or an interest therein, and it directs our attention to the construction placed upon those words in *Hagan v. Scottish Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229, where the court held that they were sufficient to show the intention to protect the interest of the insured or that of any person to whom he might transfer the insured property. In so holding we think the Supreme Court gave a wider meaning to the words than we have given to the language of the policy in the present case. Here the policy contemplated insurance, not only of the interest of the insured, but that of any person to whom the subject-matter of the policy at that time appertained. In *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90, where the policy insured the plaintiffs, naming them, and added the words, "to whom it may concern," it was held that the insurance covered the interest of an undisclosed owner of the goods at that time. We find no error in the decree of the District Court.

The decree will be affirmed.

(128 Fed. 414.)

UNITED STATES v. HEATON et al.

(Circuit Court of Appeals, Third Circuit. February 17, 1904.)

No. 39.

1. UNITED STATES—ACTION ON BOND OF CONTRACTOR—RIGHT OF PRIORITY IN FUND PAID IN BY SURETY.

Rev. St. §§ 3466-3468 [U. S. Comp. St. 1901, p. 2314], which provides that debts due the United States shall have priority in the administration of the estates of insolvents, and that a surety who pays the debt shall be subrogated to such right of priority, do not give the United States such right of priority in a fund paid into court by the surety on the bond of a contractor for government work in discharge of the obligation of the bond, which under the statute and its terms secures the claims of other creditors of the insolvent contractor as well as that of the United States, and in the absence of statutory provision such right of priority does not exist.

2. SAME—DISTRIBUTION OF FUND.

The fact that the United States first commenced an action on the bond does not give it a right to priority, and, the fund having been paid into

court, the right of the United States therein under the statute may properly be determined by the court as against other creditors brought in without objection, although the action is one at law.

3. SURETY—RIGHT TO ALLOWANCE OF COUNSEL FEES—PAYMENT OF MONEY INTO COURT.

The surety on the bond of a contractor, who when sued thereon pays into court the amount of the penal obligation of the bond, and is thereupon discharged from further liability, is not entitled to the allowance of counsel fees from the fund, which is insufficient to pay the claims of creditors of the principal against it.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 124 Fed. 699.

James B. Holland and J. Whitaker Thompson, for plaintiff in error.
Samuel Galt Birnie and F. B. Bracken, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. An action was brought by the United States against Edward Heaton and the American Bonding & Trust Company of Baltimore City, upon a bond of the defendants in the penal sum of \$8,000, conditioned for the performance by Heaton of a contract to install a system of electric light wiring in the post office building in the city of Philadelphia, and also for the prompt payment by him of all persons supplying him labor or materials in the prosecution of the work provided for in the contract. Heaton did not complete the work, and the United States in consequence paid the sum of \$4,537 in excess of the contract price to have it completed. The bonding and trust company accepted service of process and appeared by counsel. As to Heaton, the summons was returned "Not found." He is insolvent. The statement of plaintiff's claim, from which it appears that the suit was brought to recover the sum of \$4,537 above mentioned, with interest, was filed upon June 12, 1902; and thereafter, before plea pleaded, the bonding and trust company filed a petition setting forth, *inter alia*, that several persons and firms named in the petition had made demand upon the petitioner for payment by it of their respective claims for materials furnished to the said Edward Heaton in the prosecution of the said work of installing a system of electric light wiring; that these demands were made upon it as surety in this bond, by virtue of its provision for the payment of all persons supplying labor or materials as aforesaid; that these claimants threatened suit against the petitioner; and that it could not make payment to them and to the United States to the extent of their several demands without paying a sum largely in excess of its liability. It offered to pay the penal sum of the bond into court, and thereupon prayed the court to cause distribution of said sum of \$8,000 to be made among the plaintiff and all other rightful claimants thereto, etc. Upon consideration of this petition, the Circuit Court "ordered that the petitioner be permitted to pay into this court the sum of eight thousand dollars, pursuant to the prayer of said petitioner, and that Albert B. Weimer, Esq., be, and is hereby, appointed auditor to hear proof, upon due and proper notice, of all claims

as against said fund which may be presented herein by the said persons named in the foregoing petition as claimants under the bond in suit, and to make report to this court of his findings as to the respective amounts of said claims, and as to the proportion of said sum of \$8,000 which should be paid to each of said claimants, including the plaintiff herein; and the said auditor is hereby directed to notify each of the said claimants named in the said petition of this proceeding, and of the time and place when he will hear proof of their claims; and it is further ordered that upon the payment of said sum of \$8,000 into court the said petitioner shall be forever thereby released from any further liability as surety on the said bond."

No objection was made nor exception taken by the plaintiff in error, or by any other party in interest, to this order. In pursuance of it the \$8,000 was paid into court, and the proceedings contemplated by it ensued. The several claimants, including the United States, presented their claims before the auditor, who, after hearing and consideration, reported the allowance out of the fund of the expenses and costs and a counsel fee to the bonding and trust company of \$200, and the balance he distributed to the United States and to the several other claimants pro rata. To this report the plaintiff in error excepted; but the court below overruled its exceptions, and decreed distribution of the fund in accordance with the schedule submitted by the auditor. To that decree this writ of error is directed.

As stated in their brief, the contentions of counsel on behalf of the United States are:

"First, that the United States is entitled to priority and payment in full of its claim, with interest, by reason of its having first brought suit against the defendant on the bond given by the defendant company as surety for Edward Heaton; second, that the United States is entitled to priority and payment in full of its claim, with interest, under sections 3466, 3467, and 3468 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2314]; third, that the United States is not liable for counsel fees and costs in this proceeding, and that the award to the United States should not be diminished by such payment."

The right of priority affirmed by the first and second of these propositions is to priority of payment from a fund paid into court by the surety in a bond executed under and in conformity with an act of Congress requiring certain contractors with the United States to execute the usual penal bond, with sureties, "with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; * * * upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense." Act Aug. 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]. That this additional obligation was prescribed for the benefit of the persons supplying labor and materials appears from the title of the act, and also from its provision authorizing them to sue for

their own use, and it contains nothing to suggest that it was intended that their claims under such bonds were to be secondary or subordinate to those of the government. But it is argued that the right of priority asserted in this case was vested in the United States by the much earlier enactments, which are embodied in sections 3466, 3467, and 3468 of the Revised Statutes, as follows:

"Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

"Sec. 3467. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

"Sec. 3468. Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

Undoubtedly, the first of these sections does establish priority in the United States whenever the person indebted is insolvent; but the debtor with whom this controversy is concerned is not the insolvent Heaton, but is the bonding and trust company, and, as that company is admittedly solvent, section 3466 has no application. It is argued, however, that it appears, upon "reading the three sections together, that the intention of Congress was that the United States should be entitled to the same priority against the surety as against the principal." The sufficient answer to this argument is that no such intention was expressed. As was said by the learned judge of the Circuit Court:

"The United States has no priority against a surety, for the reason that no statute has given it such a privileged position, while it has priority against an insolvent principal for the analogous reason that Congress has seen fit so to enact. The right of a surety, after he has paid the money due upon his bond to the United States, to be preferred in the distribution of his insolvent principal's estate, does not depend at all upon the answer to the question whether the United States has previously had priority against the surety, but rests solely upon the language of section 3468, which expresses the legislative will upon the subject. It is this section that is the source of the surety's right, and I think its true construction gives priority for so much, and no more, of the government's claim as the surety may have been obliged to pay by legal proceedings, or may have paid voluntarily, in discharge of his obligation upon the bond."

The cases of suits upon official bonds, which have been cited in support of the proposition that the United States is entitled to priority by reason of its having first brought suit, are not pertinent. The bond sued on in this case is not an official bond. *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 96 Fed. 25. Nor is there any force in the suggestion that the court below, though sitting as a court of law, determined the rights of these parties upon equitable principles. The question was as to the legality of the claim of one of them to preferential payment out of a fund paid into court by the surety in a bond, and the validity of that claim did not depend upon the right application of any principle of equity, but upon the correct construction of the statute under which the bond was given, and of the other statutory provisions to which reference has been made. Therefore the issue was one which a strictly common-law court was competent to try, and the mode of trial which was adopted is not open to question, for all parties voluntarily submitted to it.

We think the allowance of a counsel fee to the bonding and trust company was erroneous. That company was not a mere stakeholder. It was a party, and it was for that reason that it required counsel. It is plain that his services up to the time the money was paid into court were rendered exclusively for its benefit, and with the subsequent proceedings it was not concerned. The resulting indebtedness, therefore, was absolutely its own, and should not have been charged against the fund. This ruling, however, can avail none of the claimants other than the United States, for no other of them is before this court as a plaintiff in error.

The cause will be remanded to the Circuit Court, with direction to disallow, as against the United States, the claim of the American Bonding & Trust Company of Baltimore City for a counsel fee, and the decree of that court, when amended in conformity with this direction, will stand affirmed.

(128 Fed. 418.)

DU BOIS v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. January 27, 1904.)

1. APPEAL—MATTERS REVIEWABLE—DISCRETIONARY ORDERS.

An order of a Circuit Court overruling exceptions to the report of a master for the reason that the record was not printed as required by the rules was within its discretion, and is not reviewable on appeal.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On motion to dismiss appeal or affirm order of the Circuit Court entered November 24, 1902.

William L. Pierce, for appellant.

Frederick Seymour, for appellee.

Before TOWNSEND and COXE, Circuit Judges.

PER CURIAM. We have examined the papers with care, and are satisfied that no question presented upon the hearing before the

master is reviewable in this court, for the reason that no exceptions to the master's report are before us, and the action of the Circuit Court in overruling the exceptions filed below, for the reason that the record was not printed as required by the rules, was entirely within the discretion of that court, and is not reviewable.

The only question which can be presented for review in this court is the question whether or not the Circuit Court erred in making the order of reference to the master to fix the awards. That action was unquestionably correct, unless the contention can be maintained that the various attorneys and counsel to whom awards were made by the master were precluded from receiving compensation for their services upon a quantum meruit, for the reason that they had originally been employed by the complainant, or his agent, to prosecute the action upon a contingent fee limited to a certain percentage of the recovery. Whether the complainant, after receiving the services of his lawyers for a long period of time, could discharge them and demand the papers back, without paying a reasonable sum for their services, may be a debatable question, which the appellant has a right to present to this court upon a review of the order appealed from. The papers now before us appear to contain all the facts necessary for a full discussion and determination of this question, which, it would seem, is one of law arising upon undisputed facts. If the appellant desires to present this question, he may print the record and bring on the appeal in the usual manner. Upon proof that the papers now before us have been printed and filed with the clerk, a motion will be entertained to place the cause on the calendar. If this record be not printed and filed on or before February 23, 1904, the appeal will be dismissed without further order.

The foregoing views dispose of the motion to compel the filing of the exhibits with the clerk of this court. Ordinarily, such a motion should be addressed to the Circuit Court, the record being there made up and transmitted to this court in completed form, but if upon the argument of the appeal it should appear that any of these exhibits will throw light upon the question involved, we will request the counsel in whose possession it may be to produce the original.

(128 Fed. 419.)

SNOWDEN et al. v. LOREE.

(Circuit Court of Appeals, Third Circuit. February 24, 1904.)

No. 5.

1. APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The admission of a deposition in evidence for all purposes, if error, was harmless where it ought not to have changed the result.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 122 Fed. 493.

L. C. Barton and O. F. McKenna, for plaintiffs in error.

Johns McCleave, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

63 C.C.A.—11

DALLAS, Circuit Judge. This was an action of ejectment to recover a piece of land situate in the county of Allegheny, state of Pennsylvania. It was tried by the court without a jury. The learned judge correctly held that the right of the plaintiffs to recover was dependent upon the strength of their own title, irrespective of that of the defendant. The plaintiffs based their claim of title, first, upon a patent of the state of Pennsylvania to Luke Loomis, dated August 15, 1837; and, second, upon the allegation "that plaintiffs' grantors entered into constructive possession of the land in dispute the 9th day of July, A. D. 1822, or thereabouts, and into actual possession about the 15th day of August, A. D. 1837, and that plaintiffs and their grantors held continuous, uninterrupted, hostile, and notorious possession of the same from said times up to year 1881, when they were ousted by defendant's grantor." The Circuit Court fully considered both of these matters, and reached the conclusions that the patent to Luke Loomis was void, and that the plaintiffs had failed to establish title by adverse possession. Upon attentively examining the record, we are fully satisfied that these conclusions were right, and we think that the opinion of the learned judge of the court below amply vindicates them. Notwithstanding the able argument submitted for the plaintiffs in error, we concur in that opinion, and adopt it as that of this court. *Snowden v. Loree* (C. C.) 122 Fed. 493.

The first specification avers that the court below erred in ruling during the trial that the affidavit of R. Hilands, attached to the application of Luke Loomis, wherein it was deposed that the land described in said application "was first improved in the month of June, 1829, and not before, by Luke Loomis," was admissible "for the purpose of showing the steps leading up to the granting of the patent, but not for the purpose of proving the facts therein stated." Whether the Pennsylvania rule that the recitals of title in a patent are prima facie evidence has any application in this case is at least doubtful (*Green v. Brennesholtz*, 73 Pa. 425); but that question need not be discussed, for we are clearly of opinion that this Hilands affidavit, if it had been admitted for all purposes, ought not to have changed the result. Therefore the ruling of the court in respect to it in no degree prejudiced the plaintiffs' case, and consequently that ruling, even if erroneous, would not be ground for reversal. *Hornbuckle v. Stafford*, 111 U. S. 393, 4 Sup. Ct. 515, 28 L. Ed. 468.

The judgment is affirmed.

(128 Fed. 420.)

HERMAN & GUINZBURG v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 23, 1904.)

No. 2,991.

1. CUSTOMS DUTIES—CLASSIFICATION—ORNAMENTAL GRAINS—GRASS PIQUETS.

Grass piquets, used for millinery purposes, consisting of stalks of oats and wheat, cut in the milk, and grasses, some of which are mixed with palm leaf and artificial leaves, bound together in bunches about 15 inches long, and all dyed to imitate the natural color of the plants, are dutiable

under the provision in paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], for "artificial or ornamental * * * fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed," and not under paragraph 449 of said act, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], as manufactures of grass.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 121 Fed. 201.

This is an appeal by Herman & Guinzburg, importers, from a decision of the Circuit Court (121 Fed. 201), which affirmed the decision of the Board of General Appraisers which sustained the assessment of duty by the Collector of Customs at the port of New York. The decision of the board reads as follows (In re Simon, G. A. 4511):

Wilkinson, General Appraiser. The goods are known in trade as grass piquets. They were assessed for duty at 50 per cent. ad valorem, under paragraph 425, Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], and are claimed to be dutiable at 10 per cent., or at 20 per cent. under section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], or at 30 per cent. under the provision of paragraph 449, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], for manufactures of grass. Counsel for the appellants stated that the only claim relied on was that under paragraph 449. Each piquet is a bunch about 15 inches long, bound with wire at the end of the stems. Exhibit 1 (35,424f) consists of stalks of oats cut in the milk. Exhibit 1 (37,036f) is composed of wheat of the same character, mixed with pieces of palm leaf. Exhibit 1 (37,039f) consists of two kinds of grasses, with some artificial leaves of cotton cloth, and the other piquets are similar to the foregoing. All have been dyed to imitate the natural color of the plants, and all are used for millinery purposes. The pertinent of paragraph 425 is: "And also dressed and finished birds suitable for millinery ornaments, and artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this act, fifty per centum ad valorem." The piquets in question include the stems and the leaves of the plants. The fact that the grasses are almost altogether natural does not, in the opinion of the board, exclude them from classification under the paragraph. Dyed feathers and dressed birds are no more artificial than these grasses are. We find that the goods are ornamental stems and leaves. The decisions of the collector are affirmed accordingly.

Stephen G. Clarke, for appellants.

Henry C. Platt, Asst. U. S. Atty.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The finding of the Board of General Appraisers accurately describes the importations, and we think they are more specifically enumerated by paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], than by paragraph 449, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678].

Decision affirmed.

(128 Fed. 422.)

UTARD v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 2, 1904.)

No. 3,144.

1. CUSTOMS DUTIES—GROUND GLASS—BOTTLES WITH CUT-GLASS STOPPERS.

Held, that certain bottles made of molded or pressed glass, with stoppers that have been cut or ground more than is necessary for fitting, are dutiable under paragraph 100, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], relating to "glass bottles * * * cut, * * * ground (except such grinding as is necessary for fitting stoppers)," and not as "molded or pressed * * * glass bottles," under paragraph 99 of said act (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]).

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal by Emil Utard, an importer, from an affirmance by the Circuit Court of a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs on merchandise imported at the port of New York. For decisions below, see 124 Fed. 997, and *In re Utard*, G. A. 4,769, T. D. 22,503.

The importer was dissatisfied with the conclusions of the board only as to the merchandise included in the board's third finding. The opinion of the board, so far as it refers to such merchandise, is as follows:

FISCHER, General Appraiser. The protestant imported numerous perfumery bottles of various designs and patterns, which for convenience may be divided into three classes, namely: * * * (3) Such as have ground or cut glass stoppers; this class comprising all of the goods under protest, with the exception of Nos. 2,478 and 2,724. The articles were assessed for duty at 60 per cent. ad valorem under the provisions of paragraph 100 of the act of July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], as cut-glass bottles, or as decorated glass bottles, and are claimed to be dutiable under the provisions of paragraph 99 of said act (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]). Counsel for the importers relies chiefly upon the ruling laid down in the case of *Koscherak v. United States*, 39 C. C. A. 166, 98 Fed. 596, to sustain his claim. That case arose under Act Aug. 27, 1894, c. 349, § 1, Schedule B, par. 90, 28 Stat. 513, and the paragraph construed by the court was as follows: "All glass bottles, decanters, or other vessels or articles of glass, when cut, engraved, painted, colored, printed, stained, etched, or otherwise ornamented or decorated, except such as have ground necks and stoppers only, not specially provided for in this act. * * *" The court held that etched bottles were dutiable under that provision only when such etching amounted to ornamentation or decoration, and said: "The use in the new section of the phrase, 'not otherwise ornamented or decorated,' after an enumeration of several processes by which an article may be ornamented or decorated, not only implies, but indicates, an understanding that this result of the enumerated processes is to be an ornament or decoration, in order to bring the article within the terms of the paragraph." The corresponding paragraph of the present act is, however, in somewhat different form, and is as follows: "100. Glass bottles, decanters, or other vessels or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner, or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers). * * *" If we apply the principle of the *Koscherak* Case to this paragraph, it would seem that while under the act of 1894 the "result of the enumerated processes is to be an ornament or decoration," in the present paragraph, if the result is either an ornamentation or a decoration or a grinding, the article will be included within the terms of paragraph 100. * * *

As to the balance of the goods before us, constituting the third class above referred to, it appears that, while most of them are ground and cut, some of them are cut simply; yet, as cutting is a process of grinding, we are of the opinion that the articles so treated are included within the terms "ornamented, decorated, or ground," of paragraph 100, and are dutiable under said paragraph if the grinding is more than is necessary for fitting the stoppers. From the testimony in the case and the samples before us, we find that such grinding * * * is in fact more than is necessary for fitting stoppers, and that it considerably improves the appearance of the bottles, giving the stoppers the appearance of cut glass, and relieving them of the common and cheap appearance they had when taken from the pressing mold, and we hold that these bottles are therefore dutiable under paragraph 100, as assessed. * * *

The point is made by the importers that the cost of cutting the stoppers of the bottles is so small that the classification of the articles should not be changed on that account, and the maxim, "*De minimis non curat lex*," is invoked. From the importer's own brief it appears, however, that the cost of the labor thus expended constitutes on an average over 12 per cent. of the cost of the bottles; for while the price paid, as appears by the affidavit in evidence, is only 4 centimes for each, the brief of counsel for the importers states that the average cost of the bottles is 3.78 francs per dozen, or 31.5 centimes each. But, even were the cost of the labor considerably less, it could not be disregarded, in view of the decisions of the courts. In the case of *Saltonstall v. Wiebusch*, 158 U. S. 601, 604, 15 Sup. Ct. 476, 477, 39 L. Ed. 549, the Supreme Court said: "The fact that the further process which the articles underwent represented but three or four per cent. of the total labor expended upon them is by no means decisive when it is a question of classification, since the very object of Congress may be to protect the additional labor. The lines between different articles enumerated in the tariff law are sometimes very nicely drawn, and a trifling amount of labor is often sufficient to change the nature of the article and determine its classification." And in the case of *United States v. Hinsberger Cut-Glass Company* (C. C.) 94 Fed. 645, the court, discussing the word "ground" as used in the very paragraph here under discussion, said: "Counsel for the importers contends that Congress could not have meant to provide for such an infinitesimal amount of cutting, and must have intended to cover, by the provision for articles of ground glass, only those where the grinding was done for a permanent purpose. But the court would not be authorized in thus contradicting the express provision of the statute. It is clear that this grinding is intentional and for some purpose, and as the language of the statute includes all grinding except for stoppers for bottles, and inasmuch as the bowl is an 'article of glass,' I think it is dutiable, under the provisions of paragraph 100, at 60 per cent. ad valorem." Furthermore, while the act of 1894 excepted from the operation of paragraph 90 such bottles as had "ground necks or stoppers only," the exception in the corresponding paragraph of the present act is only as to such "grinding as is necessary for fitting stoppers," making it clear that Congress intended to include in the present paragraph bottles where the grinding, although confined to the stoppers only, was more than necessary to fit the stoppers.

We accordingly * * * overrule the protests.

Frederick W. Brooks, for importer.

D. Frank Lloyd, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The findings of the Board of General Appraisers adequately state the facts, and the decision is affirmed.

(128 Fed. 424.)

SANDERS v. HANCOCK.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1904.)

No. 1,238.

1. PATENTS—INVENTION AND INFRINGEMENT—DISC PLOWS.

The Hardy patent, No. 556,972, for improvements in rotary disc plows, claim 2, as to its principal feature, which consists in setting the cutting disc not only at an angle with the line of draft, but also at an inclination backward from the vertical, was anticipated by prior patents for disc harrows; but the combination of the claim as a whole, including as elements the disc and staggered furrow and caster wheels, so placed and adjusted as to hold the disc in position horizontally and to resist the landward pressure, and which, while old, singly, by their co-operative action produce a new and improved result, is novel, and shows patentable invention. Such claim also *held* infringed.

2. SAME—INVENTION—COMBINATION.

It is not necessary to a valid combination that all the parts should co-operate all the time, but it is enough that in the normal and progressive use of the machine they do so some of the time.

3. SAME—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.

An element of a combination, although not definitely described in the claims, except by reference to the specification by the words "substantially as described" at the end of each claim, may be read into the claims, where it is fully described in the specification, and is essential to the operation of the machine.

4. SAME—INFRINGEMENT—DISC PLOWS.

The Hancock patent, No. 692,655, for means for converting a single disc plow into a plurality disc plow, and the converse, and incidentally of means for interadjustment of the disc-carrying beams and other appurtenances, construed, and *held* not anticipated, valid, and infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This appellee, Hancock, brought this suit in equity, complaining of the infringement by the appellant, Sanders, of three several patents, one of them being patent No. 556,972, dated March 24, 1896, issued to Keating as assignee of Hardy, and subsequently assigned by Keating to the complainant; another being patent No. 643,499, dated February 13, 1900, issued to the complainant; and the third, being patent No. 692,655, dated February 4, 1902, also issued to the complainant; and praying for an injunction and for profits and damages resulting from the alleged infringement. All of the patents above mentioned were for inventions of "improvements in rotary disc plows." The defendant answered the bill, denying that the several persons who were alleged to have invented the improvements for which the respective patents were granted were in fact the original inventors thereof, and he also denied infringement of any of said patents. The judge of the Circuit Court awarded a preliminary injunction pendente lite. The complainant filed a replication. Proofs were taken, and, the cause having been brought on for hearing, the court dismissed the bill as to patent No. 643,499, but decreed for the complainant in respect to the second claim of patent No. 556,972, and all of the claims, of which there were seven, of patent No. 692,655, awarding a perpetual injunction, and the recovery of profits and damages, for the ascertainment of which a reference to the master was ordered. Thereupon the defendant appealed.

The following opinions were filed in the Circuit Court by CLARK, District Judge, the first on motion for preliminary injunction, May 2, 1902:

"In disposing of the question now before the court it is not permissible or desirable that any extended discussion of the issues presented should be en-

¶ 2. See Patents, vol. 38, Cent. Dig. § 29.

tered upon. On the contrary, it has often been ruled that the court, from the very nature of the proceedings, should examine the case only far enough to ascertain whether the plaintiff has an apparent title to protection, and the court is not expected to enter into inquiry concerning difficult questions of law, or the weight and value of conflicting evidence. 3 Robinson on Patents, §§ 1173-1210; *Wise v. Grand Avenue Ry. Co.* (C. C.) 33 Fed. 277, and cases there cited.

"It may be useful to restate here certain general principles which apply on the hearing for a preliminary injunction, and some of which apply as well on final adjudication. It is well settled that a mere conception or idea of a desirable function or result, resting in the mind, which might be obtained by a machine or device, is not invention, either for the purpose of obtaining a monopoly, or for the purpose of making the defense of prior invention. Invention, in the legal sense, must involve a practical, successful, operative device. *Rubber Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410; 1 Robinson on Patents, § 335; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059; 2 Greenleaf on Evidence [16th Ed.] § 495, and cases cited. It must be a perfected invention, and either put to practical use, or be clearly capable of such use, and the novelty of an invention is not negated by a prior useless process or thing. Walker on Patents [3d Ed.] § 65. Nor is anticipation made out by a device which might, by slight modification, be made to perform the same function, if the prior invention were not designed by its maker nor adapted to actual use for the performance of such function. *Topliff v. Topliff et al.*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Krementz v. The S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134. And of course the prior invention, when relied upon as anticipating, must be a complete, operative instrument, and the burden to show this is on defendant. 2 Greenleaf on Evidence [16th Ed.] §§ 501-503, and notes. Another well-settled proposition is that even in a combination patent infringement is well established whenever the alleged infringing device accomplishes the same result, and substantially in the same way. *Cantrell et al. v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Rowell et al. v. Lindsay et al.*, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; *Machine Company v. Murphy*, 97 U. S. 120, 24 L. Ed. 935. And mere colorable and immaterial difference in the mechanical arrangement and adjustment, or difference in the form of parts of the structure, or methods of fastening or bolting such forms together, does not avoid infringement, as omitting an element, so long as the same result is obtained, and substantially in the same way. *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339; *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; Walker on Patents, §§ 350-353, 363-368, and illustrative cases. Nor for similar reasons will an immaterial addition avoid infringement. Walker on Patents, § 347. And no rearrangement or transposition of the parts or substitution of one thing for another avoid infringement, so long as the fact remains that the same result is worked out in practically the same way. Walker on Patents, §§ 348, 350.

"Attention may, I think, be called to the now well-established doctrine of the recent cases in regard to combination patents, which put those inventions on a different footing from what the tendency of the reasoning of the older cases put them. The older cases are well calculated to create the impression that a combination patent must in all cases receive a narrow construction, and that such an invention is hardly entitled to the benefit of the doctrine of equivalents. It has been demonstrated, and particularly in recent years, that patents which satisfy in the highest degree the requirements of the public, and a growing and complex business establishment such as ours, are not limited to the class called the primary or pioneer patents, but include combination patents. Indeed, the practical utility, and the change from failure to success, is shown in the highest degree in combination patents, and in view of this a more liberal attitude is now shown towards such patents. In the case of *Brammer v. Schroeder*, 106 Fed. 918, 920-921, 46 C. C. A. 41, the result of the more modern cases is restated by Judge Sanborn in the following language: 'One who invents and secures a patent for a machine or combination which first performs a useful function is thereby protected against all ma-

chines and combinations which perform the same function by equivalent mechanical devices. * * * In other words, the term mechanical equivalent, when applied to the interpretation of a pioneer patent, has a broad and generous signification. This general rule of law, like every other principle of jurisprudence, applies equally to all patents, whether for combinations, machines, or combinations of matter. If, however, one invents and secures a patent for a new combination of old mechanical elements, which first performs a useful function, he is protected against all machines and combinations which perform the same function by equivalent mechanical devices, to the same extent and in the same way as one who invents and patents a machine or composition of matter of like primary character. The doctrine of mechanical equivalents is governed by the same rules, and has the same application, when the infringement of a patent for a combination is in question as when the issue is over the infringement of a patent for any other invention. *Imhaeuser v. Buerk*, 101 U. S. 647, 653, 25 L. Ed. 945; *Griswold v. Harker*, 62 Fed. 389, 391, 10 C. C. A. 435, 437, 27 U. S. App. 122, 150; *Thomson v. Bank*, 53 Fed. 250, 253, 3 C. C. A. 518, 521, 10 U. S. App. 500, 509; *Seymour v. Osborne*, 11 Wall. 516, 542, 548, 20 L. Ed. 33; *Rees v. Gould*, 15 Wall. 187, 189, 21 L. Ed. 39; *Fay v. Cordesman*, 109 U. S. 408, 420, 3 Sup. Ct. 236, 27 L. Ed. 979; *Watermeter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024; *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 373, 3 C. C. A. 559, 565, 3 U. S. App. 340, 357; *Belding Mfg. Co. v. Challenge Corn Planter Co.*, 152 U. S. 100, 14 Sup. Ct. 492, 38 L. Ed. 370.

"And in the case of *Keystone Manufacturing Company v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, Mr. Justice Shiras, speaking for the court, said: 'Where the patented invention consists of an improvement of machines previously existing, it is not always easy to point out what it is that distinguishes a new and successful machine from an old and ineffectual one. But when, in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the courts should not be ready to adopt a narrow or astute construction fatal to the grant.' And so in the case of *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, Mr. Justice Brown, speaking for the court, said: 'The fact that this invention was first in the line of those which resulted in placing it within the power of an engineer, running a long train, to stop in about half the time and half the distance within which any similar train had stopped, is certainly deserving of recognition, and entitles the patent to a liberality of construction which would not be accorded to an ordinary improvement upon prior devices.' And in another of these *Westinghouse* cases, namely, *Westinghouse Air-Brake Co. v. New York Air-Brake Co.*, 63 Fed. 962, 11 C. C. A. 528, Judge Shipman, giving the opinion of the Circuit Court of Appeals for the Second Circuit, said: 'It is not important now to determine the grade of its pioneership, and whether it may be classed in the list of those inventions which are of the highest rank; but it was an invention created to achieve great necessities and overcome great hindrances, and was one of wide breadth. A court would not be justified in adopting a "narrow or astute construction" which would minimize the character of the invention, leave its real scope open to trespassers, and thus be "fatal to the grant."'

"I have set out the foregoing as a brief statement of the legal view under which the case is to be considered. It is well understood by the eminent counsel who are giving the case attention on both sides that I am not expected, on this hearing, to consider the case with a view of disposing finally of any serious issue of law or fact. It is manifest that I should not do so, as the affidavits of witnesses, as now presented, constitute an *ex parte* statement of the witnesses only, without the advantage of cross-examination, and certainly without the advantage of fullness in any respect.

"Now, in regard to the various patents relied on by the defendant as anticipating those of the plaintiff, it would become necessary for the defendant to show that these were practical, successful inventions, as a mere patent on

paper, accompanied with drawings or models, never reduced to practice, does not constitute anticipation. The patent must have been put into practical use, or must clearly have been such a patent as that it could have been put into practical use, and nothing short of this constitutes anticipation. And in order that the defendant might make good, if he can, the defense of prior invention, it would be necessary, in almost any case, to go fully into the evidence on that subject, which has not been done, and could not be done on this hearing.

"It is quite obvious, without stating more, that the court can act only on *prima facie* impressions of the case on this hearing, although in the main those impressions should be clear and satisfactory, in view of the fact that the case is necessarily imperfectly developed at this time. And because the court does not and cannot decide any of these issues finally, it would not be well for the court to discuss the facts found in this record, as these facts appear on an *ex parte* or *prima facie* showing, and I thereby purposely avoid doing so.

"It is sufficient now to say that I think this case has been brought fully within the doctrine of the case of *Blount v. Société Anonyme Du Filtre Chamberland & Système Pasteur et al.*, 53 Fed. 98, 3 C. C. A. 455, and this case has been often cited, approved, and followed by the Circuit Court of Appeals for this circuit in subsequent decisions, and must be regarded as controlling authority for this court.

"After a study of the affidavits of the expert, and after making a comparison of the two models by inspection, I conclude, on the record as it now is, that, with the exception of the seventh claim in the first of the Hancock patents, the claims actually in question, and about which serious issue was made on the hearing, are valid, and that they are infringed by the machine made and sold by the defendant.

"It strikes me that such changes as appear to exist between the defendant's machine and that of the plaintiff are immaterial, changes simply in form and in the method of adjusting the parts, and still more by the simple rearrangement and transposition of some of the structural parts of the machine, and the substitution in one or two instances of parts which are exactly the functional equivalent of the parts for which they are substituted.

"The circumstances which appear in the record, as it is now made up, that the plaintiff has devoted years of earnest study, and has expended large sums of money, in efforts to design and complete his invention, while the defendant has devoted no such time, and incurred no such expense, is a circumstance which is significant in the examination of these questions. It is established, as the record now is, and not controverted, that such study as the defendant has given has been with a view to so modify the plaintiff's machine as to avoid infringing it, and he does not, as the case now is, appear at any time to have entered upon any original inquiry, with a view to the exercise of his inventive genius, if he possesses any such genius. This is clearly proven by the expert mechanic of the Chattanooga Plow Works, and is not controverted by the defendant.

"And I will make but one more reference to the facts, and that is that the expert mechanics of some of the very largest manufacturing establishments in the country prove that they have carefully studied the plaintiff's invention, with a view to the very question of infringement, and that after such study it was concluded that the patent was valid, and accordingly contracts were made with the plaintiff, by which a license was obtained to make the machine in accordance with his patents and claims. This is public acquiescence in the very highest and best sense of the term, as used in the adjudged cases. Indeed, in this feature it cannot be controverted that the case is unusually strong.

"I have now said all that I feel should be said on this *prima facie* showing, and until the case shall have been seriously entered upon, and the issues made determined by careful examination of the prior state of the art, with the aid furnished by experts, subjected to the valuable test of cross-examination. It is settled beyond question that in determining whether a preliminary injunction shall issue I consider merely whether there is a strongly probable *prima facie* case made, and then I compare the inconvenience and injury which may result to one side by granting the injunction with such inconvenience and injury as may result to the plaintiff in a denial of such injunction. The court

is always, on an issue like this, discharging a delicate duty, and it is unpleasant in any case to award an injunction which does or may seriously interfere with any person's business, and it is quite unpleasant to feel the necessity of doing so in this case; but my views on this showing are such that I am left no choice but to allow the injunction, except as to the seventh claim.

"This injunction will become effective and operative from and after May 5, 1902, at which time it is conceded the present season of demand for these plows will be over. From the order allowing this injunction an appeal lies at once to the Circuit Court of Appeals, without waiting for further hearing, and the case in that court is given precedence over other cases, and it is easy to have the case reviewed and the questions adjudged by the Circuit Court of Appeals before the date when another season of demand for these plows opens, and this appeal does not interfere with the speedy preparation of the case for final hearing on its merits. The plaintiff is expected at once to enter, with all reasonable speed, upon the preparation of the case, and if the plaintiff shall fail to do this it is open to the defendant to make application to the court for such order as will be sufficient to meet any apparent disposition to delay, which is, of course, not to be expected.

"The plaintiff will execute before the clerk of this court, with satisfactory surety, bond in the sum of \$10,000, conditioned to indemnify and save the defendant against any damage which may result from the issuance of this injunction, in the event the plaintiff fails in the law suit. If a bond in this sum is not adequate, or if in consequence of future events it would become inadequate to fully protect the defendant, application can then be made to the court for a further order to increase the bond.

"The defendant is allowed to proceed under the conditions heretofore prescribed in the restraining order until May 5, 1902, at which date the injunction now granted will become effective, and restrain the defendant from further making or selling the machine complained of as an infringement in the bill. On May 5, 1902, the injunction will become fully effective."

Supplemental Opinion.

(May 4, 1902.)

"A memorandum opinion indicating my views in this case, very shortly stated, was forwarded to the clerk yesterday. To-day I am furnished, through courtesy, with the advance sheet opinion of the Circuit Court of Appeals for this circuit in the cases of the Dowagiac Manufacturing Co. v. The Superior Drill Co. and P. P. Mast & Co. v. The Superior Drill Co. (which were submitted on February 11, 1902, and decided April 8, 1902) 115 Fed. 886, 53 C. C. A. 36.

"In view of the fact that the opinions of the Circuit Court of Appeals are controlling and absolute authority for this court, and also because the case is an exceedingly well-considered one, and a most instructive one, I deem it proper that I should call attention of counsel on both sides to this opinion as a most important citation to make, in addition to those already made. In the memorandum opinion already filed I quoted liberally from the opinion of Judge Sanborn in the case of National Hollow Brake Beam Co. et al. v. Interchangeable Brake Beam Co., 45 C. C. A. 544,* to show that in a combination patent the doctrine of mechanical equivalents is governed by the same rule as when the infringement complained of is in relation to a patent for any other invention within certain limits, indicated in the opinion of Judge Sanborn, and now again in the opinion just cited. It will be seen that the Circuit Court of Appeals expressly approves the opinion of Judge Sanborn in the case just cited. It will also be noticed, of course, that the patent involved in the opinion of Judge Severens related to that class of drain drills known as 'disc drills,' and the case in all its bearings is a close analogy, I think, to the one at bar."

Opinion on Final Hearing.

(April 11, 1903.)

"This case is now before the court on final hearing, having also been before the court on two former occasions, when the same questions were elaborately discussed by eminent counsel, and given such study by the court as the importance of the issues demanded. In view of this situation, and of the fact that a written opinion was filed when the case was up for consideration on the

* 106 Fed. 693.

application for preliminary injunction, it is not necessary now that the same ground should be gone over again in this opinion, and it seems quite sufficient to state, in the briefest form possible, the result arrived at on a final study of the case, and counsel will understand the bearing of such brief observations as are necessary quite as well as from an elaborate opinion.

"Giving, then, the result, in condensed form, it seems sufficient to say that I conclude that claim 2 of the Hardy patent, No. 556,972, is valid, and the defendant does not controvert that the plow made by him is an infringement, if this claim 2 of the Hardy patent is to be regarded as valid. The only issue made on the claim of that patent is one of validity, and not of infringement. It is conceded that claim 4 of the Hancock patent of 1900 is not infringed, and this renders any ruling on the question of its validity immaterial, and, in view of the fact that the defendant changed his plow construction so as to avoid any objections under claims 5 and 6, I do not regard those claims as now in issue or calling for judgment. In reference to claim 7, I have been unable to change my opinion as formed when the case was under consideration on the application for injunction. There is much force, indeed, in the contention that as this claim covers a particular construction, being a specifically manufactured model, that it is patentable. Viewed in this light, the question must be regarded as close; but I conclude again, upon this final study of the case, that claim 7 is not valid. I also reach the conclusion, as on the former hearing, that the claims of the Hancock patent of 1902, No. 692,655, are valid, and that they are infringed by the defendant's construction. As before stated, I do not deem it necessary to go over the ground again in relation to this particular patent. It results from these views, upon the whole case, that the injunction is allowed as to claim 2 of the Hardy patent, and denied as to all the claims in issue in relation to the Hancock patent of 1900. An injunction is also allowed on the claims of the Hancock patent of 1902. Of course, if it is desired, the usual account for profits and damages will be allowed, and the costs will, agreeably to the general rule, be taxed against the defendant."

Robert Pritchard and J. B. Sizer, for appellant.

Brown & Spurlock and Williams & Lancaster, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, delivered the opinion of the court.

The principal controversy between the parties in this case relates to the validity of the two patents which were sustained by the Circuit Court. The defendant in that court contended there, as he does here, in respect to these patents, that at the time of the alleged inventions the progress of the art of manufacturing rotary disc plows had advanced so far in the direction of said inventions that no more than the skill of those conversant with the business was required to devise the alleged improvements.

Rotary disc plows, although they have been the subject of invention for 25 years or longer, have only quite recently come into extensive use. They have come in the wake of disc harrows as cultivators of the soil. A number of patents showing different forms of construction had been taken out prior to the date of the inventions of complainant's patents, and it will be convenient to state in a comprehensive way the condition of the art at that time. These plows, as they had been usually constructed, consisted of a frame, generally carried on wheels, in which was located a large concave disc, one or more, of iron or steel, having an edge on its periphery, and revolving on an axle at its center. The vertical plane of the edge of the disc was, in the usual form, perpendicular to the frame and to the soil, but the horizontal plane was turned at an angle to the line of draft, so that when the disc was let down and the machine was moved forward the disc would

enter the soil at the same angle to the line of movement, and, revolving, would turn out on its concave side a furrow of the earth scraped out by the edge of the disc, the area of earth moved corresponding with the angle at which the disc was set and the depth to which it entered the soil. Provision was made for raising and lowering the disc in the frame or with the frame, and for counteracting the sidewise pressure produced by the movement of the earth on the concave side of the disc, as by the use of sharp-edged wheels entering the soil and running parallel to the line of draft, or by staggered wheels inclining inwardly at the bottom. When more than one of such discs were used they were sometimes set one a little forward of another, and on parallel lines, so as to operate on strips of the soil after the fashion of what are known as gang plows.

It is contended for the complainant, and we think it is a just conclusion from the evidence, that certain objections had been found in such former constructions of these plows which tended to defeat their usefulness and prevented their coming into general use, notably these two: The disc, running in the ground with a perpendicular plane, simply scraped out the soil instead of plowing it, and left the soil in the bottom of the furrow compacted by the scraping; and, secondly, that in order to compel the disc to properly enter the soil it was necessary to carry a considerable weight upon it, which was dead weight, and much increased the motive power required to operate the machine. Some of the most recent patents showed columns of extra weights located above the discs to effect the purpose. The principal object of Hardy's invention, which is the subject of patent No. 556,972, is found in his conception of means for overcoming the defects above stated, though he also stated a purpose "to so arrange the landside wheel relatively to the plowing disc that it shall form a pivoted support by which the plow may be turned easily at the corner or end of the furrow."

His main purpose he accomplished by removing the dead weight hitherto found necessary to drive the disc into the ground, and turning the upper edge of the disc to a backward inclination, so that in operation it would stand not only at a horizontal angle to the line of draft, but also at an angle to the perpendicular plane of its former position. The results of this change were important. The cutting edge of the disc in its lower forward section would enter the ground at an angle more acute, the tendency of which would be to give the disc a dip or "lead" under the soil instead of rolling over it. This dispensed with the weight theretofore put into or upon the machine to impel the disc into the soil. The soil when cut up from below would slide upward and off the concave of the disc in much the same manner as it slides on the moldboard of the common plow, instead of being scraped and crowded off. Both of these features—the lightening of the load and the relief of the obstruction to the movement of the earth in front of the disc—would, of course, diminish the motive power required for the operation. Moreover, the compaction of the bottom of the furrow would be avoided, for the new angle of inclination which Hardy's invention contemplates could be so adjusted that the disc would not be riding upon the bottom of the furrow and dragging over it, but would be lifting off its furrow from the moment it is severed

by its cutting edge. It appears from the record that after the introduction of this improvement the use of these plows rapidly increased, and they were accorded public favor. This may to some extent have been due to other causes than the merit of the plows. Nevertheless we cannot but believe that the improvement we have mentioned was the principal reason, for it seems to us a probable result. Fig. 1 of the drawings of the Hardy patent shows the construction he describes, and with the description we have given of his invention, and the statement of claim 2, next following, sufficiently illustrates his improvement. It consists essentially in the location, or more particularly the position, of the disc which is turned to the left of the line of draft and backward at the top. The landside wheel is shown at 19. The caster-wheel, 8, the arm, 6, turning on the pivot, 4, and the stop, 5, about which more will be said hereafter, are also shown.

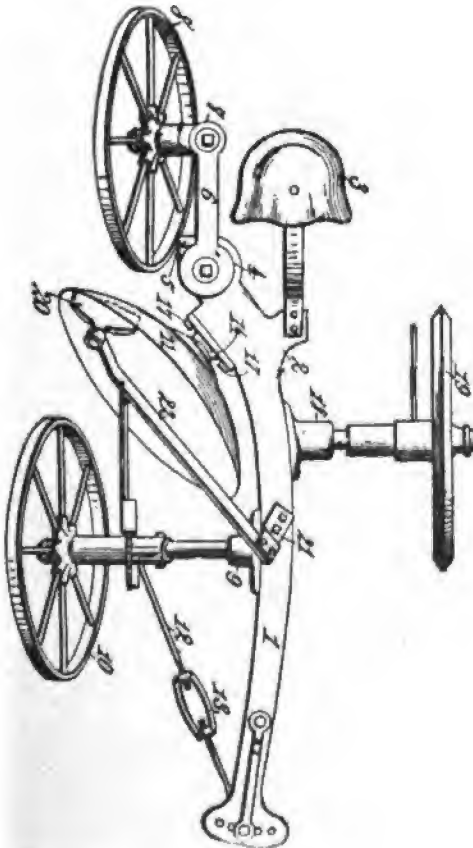


Fig. 1.

The second claim of the patent, which is the only one here involved, reads as follows:

"(2) In a rotary plow, the combination with a plow-beam, of a box-bearing arranged on the plow-beam, an axle rotatable in the box-bearing, a plowing-disc secured to the said axle, rotated solely by the natural draft thereof and the friction of the soil, set diagonally to the line of draft and inclined out

of a vertical plane for cutting the furrow, and turning the soil therefrom, a furrow-wheel mounted on an axle at the same side of the plow-beam as the plowing-disc and arranged in advance thereof, an arm pivoted to the rear portion of the plow-beam and provided with a caster-wheel arranged in rear of the plowing-disc, and a stop device for limiting the swinging motion in one direction of the arm carrying the caster-wheel, said furrow-wheel and caster-wheel being inclined for resisting the side pressure of the plowing-disc, substantially as described."

In its physical aspects the change made in the position of the disc by Hardy does not seem large, but we are satisfied that it was an important one, and contributed much to the final success of these plows.

It is contended, however, that, considered in the light of previous inventions, it is not so new or recondite but that the insight of workmen skilled in this art should have perceived the advantages which would ensue from the change of construction, and would have made it. It is shown, however, that not only the skilled workmen, but those who were giving this art special study and exploring for improvements in rotary disc plows for several years, had not perceived this one, although the need of it was always pressing. This is no new suggestion, but it seems to have special relevancy when a series of improvements has culminated in one which contributes so decisively to the utility of a machine which others have been long trying to make operative. We have said that these advantages of this improvement in plows had not been perceived. Certain references are made by appellant which are supposed to show the contrary, to the most pertinent of which we shall next give attention.

A patent to Gardiner, issued in 1883, shows a rotary plow having these discs arranged in a gang suspended on arms secured to the frame. The discs were attached to the arms by rigid axles extending from the disc into a box or bearing upon a plate which was pivoted at the bottom to the arm, and had a slot at the upper end through which ran a bolt extending into the arm. By turning the plate on the pivot the upper bolt moved through the slot, and this gave a slight inclination to the disc out of its vertical position. But the drawings of the plate and of the slot seem to show that this inclination was from the top forward only, and, if so, it would not embody Hardy's idea. Another patent referred to is one to Cleveland, issued in 1891, which was for a rotary gang plow in which the discs were not entire, but were dish-shaped rings, with cutting edges; but they do not seem to have had a vertical inclination. At least there is nothing which more certainly indicates it than the quotation from the specification which counsel makes in his brief, as follows:

"Moreover, as the cutting edge of each steel annulus (or disc) is but little lower at the point where it is tangent with the soil than the corresponding point upon the inner edge, the annulus readily enters the earth. * * * The deeper it enters the greater is the force with which it rotates, enabling the edge to cut through turf or sod and raise the soil."

But this would seem to follow from the shape of the cutting rings, which are very concave. It must be admitted, however, that both these patents came near to the development of Hardy's improvement.

But a more serious trouble for the leading purpose of Hardy's invention is found in one or more previous patents for disc harrows. A patent to Niles, issued in 1882, for "improvements in revolving plows"

(so called, but, in fact, revolving harrows), shows the discs set not only at an angle to the line of draft, but also at an inclination backward from the vertical. He describes as his preferred form a disc having a flat working face. But he says, "if it is desired, the discs may be made somewhat dishing, in which case a better moldboard effect will be produced" than with ordinary discs. And he further says:

"Now, when the machine adjusted in this way is drawn forward, this double inclination of the discs will cause them not only to cut into the ground, as shown, but also to turn it over, instead of crowding or scraping it outward from the working face of the disc in the ordinary way—that is, the portion of the disc back of the point or cut will have a moldboard action on account of the inclination downward of its axis of rotation. This moldboard action, whereby the soil is turned in furrows, is obtained to a greater or less degree by changing the angle of inclination of the shaft to the line of progression, * * * as the shafts are inclined backward more and more, the discs cut deeper, and turn the soil over more completely."

It is difficult to distinguish this from Hardy's conception. It is true it is found in a slightly different kind of machine. But they belong to the same family—a very kindred art. We think, therefore, there was no patentable novelty in Hardy's principal idea, that of the peculiar position of his disc. If it had been new, there could be no doubt it would have made his combinations new and patentable.

We have no doubt that Hardy had no knowledge of any of these former patents, for they had not been much extended in use or public notice; but the consequence of their existence no less affects his claim of novelty than if he had known all about them, notwithstanding their obscurity. *Evans v. Eaton*, 3 Wheat. 454, 514, 4 L. Ed. 433; *Fredrick R. Stearns v. Russell*, 85 Fed. 218, 29 C. C. A. 121; *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275; *Crompton v. Knowles* (C. C.) 7 Fed. 199.

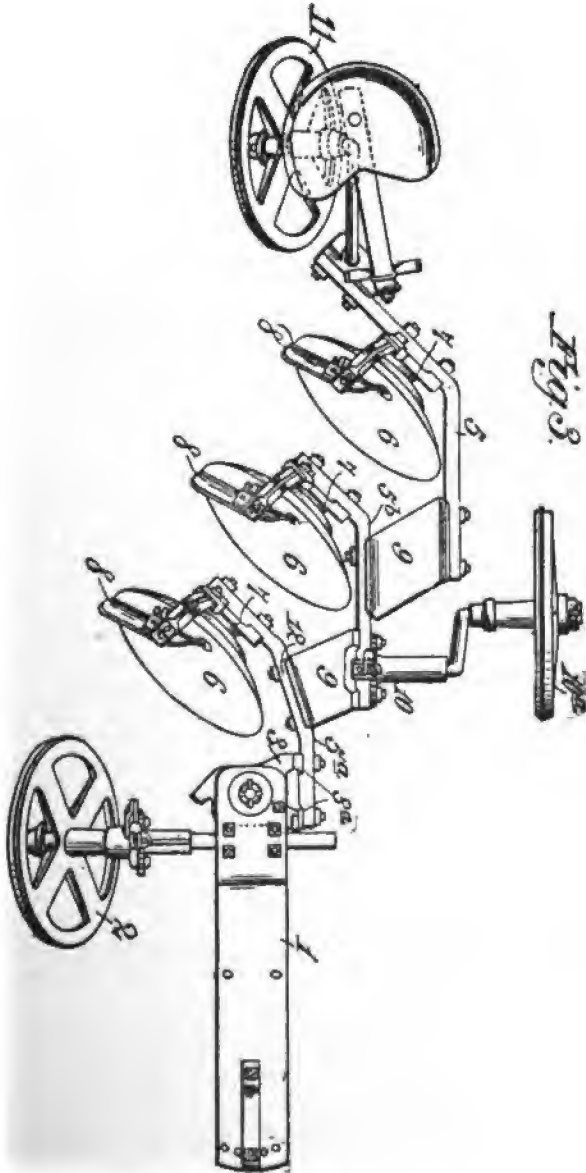
This conclusion is in accord with the ruling of the Patent Office, where the claim for the disc, separately, was rejected. But the claim for the combination which included it was held valid and allowed. We think that this conclusion also was correct. We recognize the familiar doctrine that the mere bringing together of old elements found in older machines of the same or a kindred art to perform the same functions and effect the same mechanical result does not amount to patentable invention. But we do not think the conditions of the present case justify the application of that rule. That all the elements of this combination may be found in some form and in some relations in existing machinery must be admitted, and in a restricted sense they severally perform similar functions. But they also co-operate with each other in effecting the whole result, and do not each, unaided by the others, accomplish a step in the operation. Thus the disc performs its function as it did in the earlier machines, but it does not do so unaided. Its operation is affected by the staggered wheels, which not only contribute to carry it on an even, horizontal plane, holding it to its proper depth in the soil, but resist its pressure toward the unplowed land. And the staggered wheels, as between themselves, have a co-operative effect. The furrow wheel, without the aid of the caster wheel, would draw the forward end of the plow away from the land, and throw the rear in an opposite direction. The caster wheel,

without the aid of the furrow wheel, would turn the plow off to land, and by the proper location of each with reference to the disc a uniform direction of the plow is secured. The stop preventing the swinging arm of the caster wheel holds it in line in the forward movement of the plow, leaving the wheel free to swing in the opposite direction in turning the plow around. Like observations apply to other parts of the combination. It is not necessary to a valid combination that all the parts should co-operate all the time. It is enough that, in the normal and progressive use of the machine, they do so some of the time. Again, the patent describes that the staggered furrow wheel shall be located about the middle of the length of the frame, but in advance of the disc. This relative location of the wheel and disc near each other also facilitates their continued uniform co-operation when plowing around corners or when plowing crooked furrows.

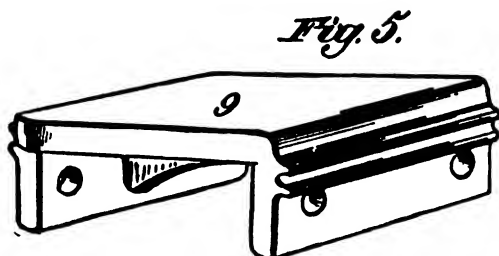
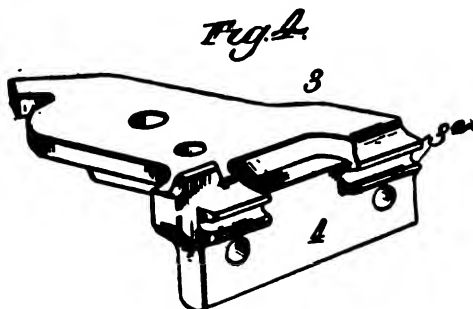
We have in several instances held valid combinations of old elements when from their different location in the new organization a different mechanical result was effected and a beneficial use subserved. Thus, in *Star Brass Works v. General Electric Co.*, 111 Fed. 398, 49 C. C. A. 409, the new location given to the brush which takes off the current from a trolley wheel on street railway cars, which effected a more advantageous transmission of the current and afforded better protection to the brush, was patentable. In *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 53 C. C. A. 36, the changing of the location of a shield running by the side of a disc in a seed drill, which although it performed a similar service effected a different result in its combination with other parts, which was beneficial, entitled the author to a patent. And in *Stilwell, Bierce & Smith Vaile Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 54 C. C. A. 584, we held the location of a conveyor of oil meal in a new and different place in the machinery which effected a better result than had been previously obtained gave valid claim to a patent. We are not referred to any prior rotary disc plow or other machine which embodied the same elements or similar elements organized in a similar manner to that of the Hardy plow. And, having regard to the presumption of validity arising from the grant, the success which it has attained, the nonexistence of any anticipation, and the adoption of it by the defendant in his business, with express notice of the patent, and with a view to profit by it, we think we should hold the combination of claim 2 to be valid. *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.*, 120 Fed. 267, 272, 56 C. C. A. 547; *Lehnbeuter v. Holthaus*, 105 U. S. 94, 96, 26 L. Ed. 939; *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; *Streator Cathedral Glass Co. v. Wire Glass Co.*, 97 Fed. 950, 38 C. C. A. 573. Infringement thereof if the claim is held valid is not seriously disputed, nor could it be successfully, for it is free from doubt. The defendant's plow is a copy of the complainant's in all essential particulars.

The invention covered by the Hancock patent, No. 692,655, had for its object the provision of means for converting a single disc plow into a plurality disc plow, or the converse, and, incidentally, of means for interadjustment of the disc-carrying beams and their appurtenances. Aside from the manner of arrangement, the novel things supplied were principally a "coupling element" designed to connect the primary beam

of the plow, and, through it, the whole organization of the working parts of the plow, to the tongue, and a "spacing number" or plate, with flanges at the side to insert between the several beams when more than one disc is used, which serves the purpose of holding the beams in relation to each other at the proper distance apart. Fig. 3 of the drawings shows the general organization of the plurality disc plow, 3 being the coupling element, and 9 a spacing plate.



Figures 4 and 5 show the coupling element, 3, and the spacing member, 9, more clearly.



The primary beam is attached to the coupling element on the flange, 4, of Fig. 4, and the coupling element is connected with the tongue by a bolt running through the central hole on the horizontal part, 3, and the rear end of the tongue as shown in Fig. 3. The disc carrying beams are shown in Fig. 3. There are seven claims, all of which are for combinations in disc plows embodying one or both of the special features above mentioned. The "spacing members" are not described in the claims except by reference to the specifications by the words "substantially as described" at the end of each claim. But as we have held (*Soehner v. Favorite Stove & Range Co.*, 84 Fed. 182, 28 C. C. A. 317; *Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 54 C. C. A. 584; *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* [C. C. A.] 120 Fed. 267; ¹ *Canda v. Michigan Malleable Iron Co.* [C. C. A.] 124 Fed. 486),² this carries into the claims the description of the specification. The defendant denies that there was any invention disclosed by this patent, because, he says, of earlier patents, which he alleges fully anticipated it. We think it sufficiently appears from the references made that "spacing members," of a kind so closely resembling those of Hancock as to deprive his form of construction of the merit of invention, had been disclosed in former patents or in prior public use. But in respect to the "coupling element," which he makes an element in all his claims, there is more doubt; and it is necessary to know more definitely what his coupling element is or may be, within the scope of his claims, and they, as we said of his "spacing members," must be construed, when they lack definiteness, by reference to his

¹ 56 C. C. A. 547.

² 61 C. C. A. 194.

specification. It must be admitted, we think that by his coupling element must be understood a distinct member, and not all kinds of means for effecting a connection between the primary beam and the tongue. So restricted, we do not find anything in the prior art which anticipates his device. But it is contended that, assuming this to be so, the defendant does not infringe, because, as is said, Hancock's coupler is one having a pivotal or hinged connection with the tongue, and this Sanders does not use, but bolts his coupler rigidly upon the tongue. But is Hancock restricted to a coupler having a pivotal connection with the tongue? In his drawings he shows Fig. 4 above, two bolt holes in plate 3. Only the one at the left hand will be used when he employs a pivotal connection, which he says he prefers. The other bolt hole nearer the edge of the plate finds correspondence in the head or burr of a bolt shown in Fig. 3 forward, and a little to the left of the central bolt on the rear of the tongue. When both bolts are used the connection is rigid, and there is no pivot. Then he says in his specification:

"The numeral 8 indicates the preferred form of coupling element or bracket employed, and to which the rear end of the tongue is pivotally connected, so that the tongue and the staggered furrow-wheel carried thereby may swing in the proper direction to facilitate the turning of the plow."

The reason for his preference is easy to see. If the turning pivot is located at that point, the turn would be made without swinging the discs; whereas, if the turn is made on the caster wheel behind the body of the plow, all the discs must swing in turning. This language of the patentee just quoted plainly imports that he does not limit himself to a coupler having a pivotal connection with the tongue. He gives, as he is required to do by the statute, "the best mode of applying the principle" of his invention. If there were nothing more, this statement, coupled with the drawings, fairly indicates that he did not limit himself to a bracket having a pivotal connection with the tongue, and he indicates in a way which any mechanic would understand another form of bracket, which would have a rigid connection, and the claims are broad enough to include this form. This is the form and character of the bracket employed by the defendant. We find no sufficient reason for denying validity to the Hancock patent, and, no other material distinction between the defendant's organization and that of the Hancock patent than that we have already discussed being pointed out, we think the charge of infringement is sustained.

As these conclusions are in accord with those of the Circuit Court, its decree will be affirmed.

(128 Fed. 437.)

WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court of Appeals, Second Circuit. January 25, 1904.)

No. 77.

1. PATENTS — VALIDITY AND INFRINGEMENT — VALVE MECHANISM FOR AIR-BRAKES.

The Boyden patent, No. 481,134, for a valve mechanism for automatic air-brakes, which admits both train-pipe air and auxiliary-reservoir air to the brake-cylinder in applying for emergency stops, and which is provided with means for restricting the flow of auxiliary-reservoir air, as

compared with the flow of train-pipe air, thereto, was not anticipated, and shows patentable invention; but, in view of the prior art, it must be restricted in construction to the combination of mechanical elements described and shown, or their equivalents, and, as so limited, claim 2 can be given no broader construction than to cover the mechanism described in claim 11. Claims 4 and 11 *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 123 Fed. 306. See 113 Fed. 594.

Wm. A. Jenner, for appellant.

J. Snowden Bell and F. H. Betts, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. In disposing of this appeal, it would subserve no useful purpose to rehearse the history of the railway brake litigation during the past 15 years, or to discuss the mechanical construction of the devices under consideration. To those who are familiar with the progress of the art, the issues herein are simple and easily understood. This defendant was originally sued by this complainant for infringement of its Westinghouse patent, No. 360,070. The defendant there contended, and the court sustained its contention, that its device (the one which is here alleged to infringe) resembled that of certain Boyden patents, one of which is the patent here in suit, and a motion for a preliminary injunction was denied on that ground. Thereafter complainant, having become the owner of said Boyden patents, brought this suit on one of them, alleging infringement thereof. The court below originally granted a preliminary injunction, and afterwards, upon final hearing, an injunction and accounting, from which this appeal is taken.

The devices here in question belong to the class known as "quick action triple valves," such as are used in connection with the ordinary automatic brake systems on railways. Their special and peculiar utility consists in their adaptation for use in effecting the application of the brakes for making emergency stops. In the specification of the patent in suit, Boyden, the inventor, states that in all prior constructions a supplemental passage was required, in connection with the triple valve proper, in order to combine with the preservation of its ordinary functions the additional function of introducing train-pipe air into the brake-cylinder for emergency stops. An example of a prior construction referred to in said specification is Westinghouse patent, No. 360,070. There, upon an extreme reduction of pressure for an emergency stop, the piston of the triple valve uncovered a separate emergency port, through which train-pipe pressure passed from the train pipe into the brake-cylinder. An improvement upon this construction, covered by Westinghouse patent No. 376,837, consisted in the use of a separate supplemental piston and valve. Boyden states that he has "provided a new principle of construction and a new mode of operation, by use of which the desired result aforesaid may be produced without the aid of the auxiliary valve heretofore required for the purpose." He then explains that this new invention embodies only a triple valve, *per se*, without auxiliary device; explains that its greater efficiency depends upon his in-

vention of means for restricting the flow of auxiliary-reservoir air to the brake-cylinder, as compared with the more open delivery of train-pipe air, and that, as a result of thus graduating the flow of air at different pressures, he secured the desired result by the use solely of the main valve, which "is here made to perform the office of opening communication to the brake-cylinder from both the train-pipe and the auxiliary reservoir in the quick application of the brakes for emergency stops."

The defendant alleges noninfringement, anticipation, and invalidity of the claims in suit. The admissions of defendant's experts and the opinion of the Supreme Court of the United States as to the Boyden patents simplify and narrow the scope of the issues presented, and dispense us from the necessity to discuss at length some of the defenses argued.

Messrs. Quimby and Christensen, in their affidavits in the original suit on patent No. 360,070, in differentiating defendant's device from that of No. 360,070, specifically pointed out the details in which defendant's device corresponded in construction and operation with the Boyden device. And defendant's expert, Livermore, having clearly and exhaustively discussed the whole railway brake art, is forced to admit that, with a single immaterial qualification, he finds in defendant's device all the elements of the three claims in suit. A comparison of the two structures establishes infringement of claims 4 and 11.

The court below, in its opinion, has, by its citations from the specifications of the patent and in its discussion of the evidence, accurately defined the construction of the patented valve and its operation in the emergency applications. Upon sudden reduction of train-pipe pressure a single triple valve piston moves to the extreme limit of its traverse, and opens a single emergency valve, which establishes communication through a single passage between both the train-pipe and auxiliary-reservoir passages and the brake-cylinder. The passage from the auxiliary reservoir is restricted at a given point. This is the means specified in the patent to comparatively restrict the flow of the two airs to the brake-cylinder. Such comparative restriction in emergency applications is necessary because the pressure of the train-pipe air is much lower than that of auxiliary-reservoir air, and it has been found to be of practical importance that the train-pipe air should be more freely vented into the brake-cylinder until the two pressures are equalized, or so that, in a certain sense, it may be said that the reservoir air follows the train-pipe air into the brake-cylinder. In defendant's valve, upon reduction of train-pipe pressure, a piston like that of complainant also moves to the extreme limit of its traverse, and opens a single emergency valve, which establishes communication through a single passage between both air passages and the brake-cylinder; the passage from the auxiliary reservoir being restricted as in complainant's device.

The Supreme Court of the United States (170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136), in discussing the Boyden patents, including the one here in suit, in connection with the Westinghouse patents, held as follows:

"Mr. Boyden has certainly exhibited great ingenuity in the discovery of a new and more perfect method of performing such [Westinghouse's] function.

If his patent be compared with the later Westinghouse patent, No. 376,837, * * * the difference between the two, both in form and principle, becomes still more apparent, and the greater simplicity of the Boyden patent certainly entitles it to a favorable consideration. * * * Under such circumstances, the law entitles him [Boyden] to the rights of an independent inventor."

In view of this statement, it is unnecessary to consider the evidence, which conclusively shows that this device involved invention.

The objections urged in the court below, and chiefly relied on here, attack the status of the patent in suit, and are to the effect that the patent, in view of the prior art, is not entitled to a broad construction, and that the claims in suit, especially claim 2, are void for various reasons, or, if not void, must be so limited as to relieve defendant from the charge of infringement. And counsel for appellant strenuously contends that the court below has misconceived the opinion of the Supreme Court as to the character of this patent, and has mistakenly held that it covered a primary invention.

The claims in suit are as follows:

"(2) In valve mechanism for automatic air-brakes, the combination of a communication with the brake-cylinder from both the auxiliary-reservoir and train-pipe, a single valve controlling said communication, and means to retard or restrict the flow thereto of the auxiliary-reservoir air when applying the brakes in comparison with the flow of train-pipe air, whereby train-pipe air at lower pressure than said auxiliary-reservoir air will pass said valve when making an emergency application of the brakes."

"(4) In a valve for automatic air-brakes, the combination of a communication with the brake-cylinder, a suitable valve controlling said communication, two air-passages coacting with said valve and relatively proportioned as to their capacity to allow the flow of both train-pipe air and auxiliary-reservoir air each at a different pressure to pass said valve when open, and a check-valve to prevent the return of air to the train-pipe."

"(11) In valve mechanism for automatic air-brakes, the combination of a main port communicating with a brake-cylinder from both the train-pipe and the auxiliary-reservoir, a suitable valve controlling said main port, a graduating-valve which admits air-pressure in small volume to the brake-cylinder, and air-passages coacting with said main port and relatively proportioned as to their capacity to allow both train-pipe air and auxiliary-reservoir air, each at a different pressure, to pass to said main port when the latter is open."

In view of the admission of defendant's expert that only two patents (Boyden 1883 patent, No. 280,285, and Holleman patent, No. 405,705) anticipate or impose limitations upon the claims in suit, we shall not discuss the numerous other patents cited.

The device of the Boyden 1883 patent admits both train-pipe air and auxiliary-reservoir air to the brake-cylinder through the same valve, for the purpose of recharging the auxiliary reservoir when the pressure is reduced by leakage, without releasing the brake. The valve of this patent differs so materially in construction and operation from the automatic quick action valves here under consideration that its triple valve could not be used in connection with these later valves. The valve is provided with train-pipe, auxiliary-reservoir, and brake-cylinder connections, controlled by two pistons so connected together as to form a double-ended piston, balanced by equal pressure of auxiliary-reservoir air on the inner faces of both pistons. For reasons hereafter to be stated, it is unnecessary to further explain its construction. Upon a sudden release of a considerable quantity of train-pipe pressure, the piston descends in such a way

as to cause auxiliary-reservoir pressure to flow into the brake cylinder, and thereby, in combination with other parts of the apparatus, to permit train-pipe air also to pass into the brake-cylinder. It will be observed that this operation partakes of the characteristics of quick action operation. But it is admitted that this valve never went into practical use; that its operation would require great care and attention; that, while pressure may be increased as above, it cannot be diminished, except by releasing the brakes; and "that the passages are not properly proportioned to produce highly effective quick serial action." The patentee, in his specification, failed to refer to any capacity for quick action, and admitted, contrary to his own interest, in the Westinghouse-Boyden suit, considered by the Supreme Court, that it "was not a quick action valve, or intended as such." The statements of the objects of the invention in the specifications of the patent confirm the opinion of the court below that its scope is limited to an invention "whose object was to provide for replenishing, 'while the brake is on,' the air reservoir or brake-cylinder, when the pressure is reduced by leakage," etc. From the whole evidence, it is clear that this device does not provide any means for comparatively restricting the flow of the two airs to the brake-cylinder, and that such material alterations as would make it an operative quick action valve would destroy it for the performance of the functions for which it was designed.

Holleman patent, No. 405,705, of 1889, was not pleaded in the answer, nor greatly pressed upon the argument except as to the single point which will be considered hereafter. It describes and shows a triple valve, which, as stated in the specification, is capable, upon sudden great reduction of train pressure, of admitting air to the brake-cylinder from train-pipe and auxiliary-reservoir through a single passage. The drawings show a construction apparently capable of such operation. There is a conflict of testimony as to whether such construction would be practicable. This device appears to be an improvement upon an earlier Perkins patent, No. 163,242, of May 11, 1875. One serious objection to its limiting effect upon the patent in suit is that, while the two airs eventually flow through the same passage to the brake-cylinder, the passages from the train-pipe and auxiliary-reservoir, respectively, are controlled by separate, although rigidly connected, valves covering different and distinct ports, and which depend upon different air pressures to hold the valves upon their seats. It does not appear that any device has been made under the Holleman patent. It fails to show any proportioning of the auxiliary-reservoir and train-pipe airs, and the patent is entirely silent on this point.

But the relevancy of these two patents and of Westinghouse patent, No. 360,070, to the issues herein, appears from the contention by defendant that, in view of Boyden's single controlling valve for both airs, and Holleman's construction, and the restricted port of No. 360,070, no broad claim for a single valve controlling both airs could be sustained, and that it would not involve invention to proportion the flow of air in the reservoir and train-pipe passages so as to accomplish the result of the patent in suit. This contention brings us to a consideration of the forcible argument of counsel for

defendant that the claims in suit, and especially claim 2, are absolutely void.

Claim 2, for "communication with the brake-cylinder from both the auxiliary-reservoir and the train-pipe," and "a single valve controlling said communication," and means to retard "or restrict the flow thereto of the auxiliary-reservoir air when applying the brakes in comparison with the flow of train-pipe air, whereby," etc., comprises the single valve controlling both airs and the narrow opening in the auxiliary-reservoir air passage. This claim is broad enough in terms to include any single controlling valve, and any means to restrict comparatively reservoir air. It is admitted that "the essential feature of novelty and utility" is the single valve, controlling both train-pipe and reservoir air. But, as already shown, Boyden, in his 1883 patent, showed a device wherein, upon an extreme traverse of a piston, a single valve controlled the passage of train-pipe and auxiliary-reservoir air to the brake-cylinder. And in Holleman, as we have seen, the extreme traverse of a single piston controlling a valve, structurally single, but functionally double, causes said valve to admit train-pipe and auxiliary-reservoir air to the brake-cylinder, and thus accelerates the emergency action. Its two air passages seem to be adapted to the comparatively restricted construction covered by the patent in suit, as already shown. It may be assumed that Boyden of 1883 and Holleman were mere paper patents, not capable of successful practical operation. But this does not defeat their relevancy as limitations upon the scope of the patent in suit, provided they sufficiently embody the elements and disclose the principle of operation of said patent. *Pickering v. Lomax*, 104 U. S. 310, 319, 36 L. Ed. 716; *Packard v. Lacing-Stud Co.*, 70 Fed. 66, 16 C. C. A. 639; *Dashiell v. Grosvenor*, 162 U. S. 425, 16 Sup. Ct. 805, 40 L. Ed. 1025. Their effect and that of Westinghouse patent, No. 360,070, in showing the prior use of a single controlling valve, and of restricted openings where more than one valve is used, is to establish that what the patentee did was to develop and combine along practical lines the ideas and instrumentalities of others, and those described in his own prior patent.

Defendant's expert, Livermore, has accurately defined the status of this patent in suit by his testimony, as follows:

"The Boyden patent in suit, however, is, so far as I know, the first one that shows a single valve which admits air both from the train-pipe and from the auxiliary-reservoir into the brake-cylinder, and in which the passage which supplies the air from the auxiliary-reservoir is of smaller size or sectional area than the passage which supplies the air from the train-pipe. * * * I have treated the invention forming the subject of the patent as including broadly the combination of elements by which the valves of the Boyden patent in suit accomplish the result aimed at with a mode of operation that differs substantially from that involved in all of the other quick action triple valves known to me, or considered by me in this case."

The patentee says in his specification, after describing his embodiment of his invention, as follows:

"My invention therefore includes any form of structure of valve wherein a single valve admits both train-pipe air and auxiliary-reservoir air to the brake-cylinder in applying for emergency stops, and which structure is provided with

means for restricting or retarding the flow of auxiliary-reservoir air to the brake-cylinder, as compared with the flow of the train-pipe air thereto."

But this does not necessarily follow from the statement of his invention, because the utmost that can be claimed for it is that it broadly covers his elements so combined as to accomplish an old result by a substantially new mode of operation.

Claim 2 should not be construed to cover every single controlling valve, and every means whereby to restrict the flow of reservoir air thereto, because each of these means was old. It is possible that a valve device might be constructed, embracing a single controlling valve and restricting means, and yet involve independent invention, or make use only of a combination of the elements found in the prior art. A construction of claim 2 to cover "every form of structure," etc., as is contended for by complainant, would not only unlawfully restrict other independent inventors who wished to avail themselves of the Boyden 1883 and Holleman valves in new and independent relations, but would, in effect, sustain said claim for a function, for the doing of a thing, the accomplishment of a result, in every possible way, irrespective of the means employed therefor. We conclude that the second claim, thus broadly construed, cannot be sustained.

If claim 2 be given such a limited construction as to cover only the combination of elements described and shown by the patentee and the equivalents thereof, then it is identical with claim 11.

The fourth claim covers specifically a "valve controlling two air passages coacting with said valve, and relatively proportioned as to their capacity to allow the flow" of the two airs, each at different pressures, to pass said valve, and "a check valve." The additional element is the check valve, which is found also in defendant's device. This claim is quite as broad as the scope of the invention admits. But here the specific means—the "air passages * * * relatively proportioned," and their operative relation "coacting with said valve"—are definitely set forth. We conclude that this claim is valid.

Claim 11 is a clear, precise, definite statement of the elements of complainant's invention, combined and limited in conformity with the statement of the invention in the specification. That these two claims are infringed is sufficiently shown by the comparison of the two devices and the admissions of defendant's experts, already discussed, and by the instructions given in defendant's "Christensen Instruction Book" for using its apparatus, as pointed out in the opinion of the court below.

Various other questions were raised in the briefs and on the arguments, such as the alleged impracticability of complainant's device, the fact that certain elements in defendant's infringing device perform a variety of functions not performed by those of complainant, etc. These contentions have not been discussed, but have been duly considered in determining the validity and scope of the claims in suit.

The decree of the Circuit Court is reversed as to claim 2, and is affirmed as to claims 4 and 11, without costs of this court, and cause remanded to the court below, with instructions to enter a decree in conformity with this opinion, and with two-thirds costs to complainant.

(128 Fed. 558.)

KOEWING v. WILDER.

(Circuit Court of Appeals, Second Circuit. March 3, 1904.)

No. 122.

1. SALES—CONTRACTS—REDUCTION TO WRITING—STATUTE OF FRAUDS—PART PAYMENT.

Plaintiff and defendant made two oral contracts, one for the sale of all the stock of the S. Company to defendant for \$500,000, which was subsequently reduced to writing, and the other for the sale of 100 shares of the stock of the B. Company by defendant to plaintiff for \$10,000, which was not reduced to writing. *Held*, that in the absence of evidence that at the time the contract for the S. stock was reduced to writing and delivered the parties restated the prior oral agreement for the sale of the B. stock, and intended to validate the same as a part of the contract, the delivery and the performance of the contract for the sale of the S. stock did not constitute a payment of a part of the purchase money for the sale of the B. stock at the time, so as to take that contract out of the statute of frauds.

In Error to the Circuit Court of the United States for the Southern District of New York.

See 126 Fed. 472.

This cause comes here upon writ of error to review a judgment of the United States Circuit Court, Southern District of New York. The judgment was entered upon a verdict in favor of the defendant below (who is defendant in error), which verdict was directed by the court at the close of plaintiff's case. The action was brought to recover damages for the failure of defendant to transfer to plaintiff 100 shares of the stock of the Butterick Publishing Company at the price of \$100 per share. The answer set up the statute of frauds, and averred that neither the contract declared upon, nor any note or memorandum of it, was ever made in writing, nor did the plaintiff at the time pay any part of the purchase money. The facts sufficiently appear in the opinion.

A. C. Sheussane, for plaintiff in error.

Herbert Noble, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Inasmuch as the cause was disposed of at the close of plaintiff's proofs, his narrative of the transactions is to be taken as correct. He was the only witness, except as to value of the stock. This is his story: He owned and controlled the entire capital stock of the Standard Fashion Company. The defendant was vice president of the Butterick Company, and had expressed a wish to purchase the entire stock of the Standard Company. A meeting took place between the parties early in January, 1900, at which defendant stated that a man named Hudson, who was secretary of the Butterick, was about to be dismissed, in which event 200 shares of its stock then held by Hudson would be called in by defendant, under an agreement which he had with Hudson; that, if plaintiff would make an offer of the Standard stock low enough to enable defendant and his backers to purchase it, he would let plaintiff have 100 shares of the Hudson stock. Nothing was said at the time about prices. The next day they met again, and in response to a question defendant stated that he meant that plaintiff should have the Butterick stock at par. At that interview plaintiff

named no price for the Standard stock. Negotiations continued for a few days, until the minds of both parties met, January 10th, on the proposition that plaintiff would sell the entire stock of the Standard Company for \$500,000, and an agreement to be employed by the Butterick Company for a stated period at \$5,000 a year. Defendant at the time repeated his offer of the 100 shares of the Butterick stock. Both sides agreed to these terms, and it was arranged that a written contract should be prepared, defendant stating that he did not wish the matter of the 100 shares of Butterick to be incorporated therein, because he desired not to have that part of the agreement known to others, who might object. A written contract, dated January 15th, was prepared, which covered the sale of the Standard stock, but was silent as to any sale of Butterick stock. It was signed on January 22d. The plaintiff's testimony is:

"Eventually the contract was concluded on or about January 22d, and the first payment was made of \$25,000. He handed me the first money with the remark, and it being again and again gone over by us, that the 100 shares of stock would be delivered to me for \$10,000 as soon as he received them from Hudson, * * * and Mr. Wilder said again he would deliver me 100 shares for \$10,000 as soon as he should get them."

Manifestly there was no contract, note, or memorandum signed, and the only question is whether within the terms of the statute the plaintiff, at the time the contract was made, paid any part of the purchase money.

The testimony indicates that there were two contracts between the parties—one for the sale of the Standard stock by plaintiff to defendant for \$500,000, which was reduced to writing; the other for the sale of 100 shares of Butterick stock by defendant to plaintiff for \$10,000. There was not a single contract to sell the Standard stock for \$490,000 and 100 shares of Butterick stock. Whatever may have been discussed between the parties as to the terms of sale of the Standard stock must be considered as all merged in the written contract. Nevertheless it was open to the parties to make a contract for the Butterick stock, in which the execution of the contract for the other stock was named as a part of the consideration. And we agree with the proposition of the plaintiff that the words in the statute, "pay any part of the purchase money," are broad enough to cover any part of the consideration, whether it is money or not. The only question presented here is whether the delivery of the executed Standard contract was made "at the time" the contract was made, within the meaning of the statute of frauds of the state of New York. That statute was discussed by this court in *Raymond v. Colton*, 104 Fed. 219, 43 C. C. A. 501, and *Colton v. Raymond*, 114 Fed. 863, 52 C. C. A. 382. It was there held that certain resignations were in part the consideration for a certain promise to purchase, and their delivery "a part payment of the purchase money." The contract in that case was made on August 3d, and the resignations were delivered on August 15th. There was considerable testimony as to what was said at the time they were delivered. This court held (on the first appeal) that "as there was no restatement or reaffirmation of the terms of the prior oral agreement between the parties at the time of the delivery of the resignations, except by implication, and as

they were not delivered for the express purpose of complying with the statute and validating the contract, it must be held that there was no part payment at the time of the contract, within the meaning of the statute as construed by the highest courts of the state." On the second appeal it was held that "a payment made subsequent to the time of the original contract is to be deemed made at the time of the contract, if there was such a reaffirmation of the prior contract as to constitute a new contract; * * * that reaffirmation is one which is made by express terms, and not one which arises from the making and the reception of the payment upon the tacit or implied understanding that the contract formally made was in force." And the court, in illustration of what is required, cited from *Jackson v. Tupper*, 101 N. Y. 519, 5 N. E. 66:

"There was no restatement of the terms of the prior oral agreement when the payment was made, and no express recognition thereof, nor was the payment made for the avowed purpose of binding the prior bargain."

It also cited from *Bissell v. Balcom*, 39 N. Y. 275:

"Here is a distinct intelligent reference by both parties to the negotiation of the previous day—a recognition by both of its want of binding force or validity, because no part of the stipulated price was paid; a declared intent to make the bargain valid and binding, assented to; a request for the payment of money for that purpose, and a payment in compliance with that request."

The opinion of this court in *Colton v. Raymond* concludes:

"Upon principle and logically there can be no payment made at the time of the contract unless it is made as part of the negotiations or at the time when the negotiation is concluded; otherwise the statutory provision would be nugatory. If there is a new contract in which the parties agree to reinstate a previous one for the purpose of validating it according to the statute, so that it is to take effect as a new agreement in substitution of the void one, and a payment is made at the time, the statute is satisfied. If they get together, and by words or implication say to one another, 'We recognize that the bargain we have previously made is not enforceable, but we are willing to stand by its terms upon the immediate payment of the purchase money, or part of it,' there is a new contract supported by a new consideration."

From these citations it is apparent that, in order to take an oral contract out of the statute of frauds by a subsequent payment, there must be an intelligent understanding by the parties of the existing situation, an intent to make their void contract valid, and a restatement at the time of payment in express language of all the terms of the old contract. Counsel for plaintiff in his brief concedes that at the time a part of the consideration is paid "the terms of the old void contract [should be] repeated, restated, renewed, reaffirmed, re-enacted, revived, readopted, and recognized as the terms of the contract which they were then making." The evidence falls short of this. The minds of the parties met on January 10th. At that time all the terms of both contracts were agreed to. There is nothing to indicate that at the subsequent interview, when the contract to sell Standard stock was signed and delivered, any new provisions were incorporated in either contract. There is nothing to show that the delivery of the signed Standard contract on that day was intended or understood by either party to be a payment to bind a bargain otherwise void, or anything else than a carrying out of the terms of the oral contract of January

10th. There is nothing to show that they both recognized that said oral contract was without binding force or validity, or that they restated its terms in order to substitute a new and valid contract in its place. The cause cannot be distinguished from the Colton and Raymond Case, where the resignations were delivered upon the tacit or implied understanding that the prior agreement was in force, and under the rule laid down in that case delivery of the signed Standard contract, without the slightest suggestion in the testimony that either side supposed it was necessary in order to bind a prior bargain, cannot be held to be a "payment at the time," which will take the case out of the statute.

The judgment is affirmed.

(128 Fed. 561.)

SMITH v. DAY et al.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1904.)

No. 959.

1. NEGLIGENCE—WHEN QUESTION FOR JURY—EVIDENCE CONSIDERED.

Defendants were contractors engaged in the construction of locks for the government at the Cascades in the Columbia river, and in the course of the work were doing blasting. A steamer used a landing on the reserved premises on its daily trips, and remained there for some time. While so lying with some passengers on board, and others passing to and from the boat, defendants fired a blast at a distance of 150 to 200 feet from the landing, and a piece of rock struck and injured plaintiff, who was in the boat. Plaintiff testified that he heard blasting some time before, but thought it was at a greater distance. *Held*, that while defendants had a right to continue the prosecution of their work, and passengers on the boat or premises assumed all risks necessarily incident thereto if conducted with skill and reasonable care, whether or not defendants exercised such skill and care, there being evidence tending to show that they gave no notice to the boat passengers that a blast was about to be fired, and whether plaintiff was guilty of contributory negligence, were questions of fact to be determined by the jury under all the evidence.

Gilbert, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Oregon.

This was an action to recover damages sustained by the plaintiff while a passenger on a steamboat belonging to a public transportation company engaged in navigating the Columbia river. The defendants were contractors engaged in the construction of locks for the government at the cascades in said river. The plaintiff, with other passengers, entered the boat of the navigation company while it was lying at a wharf on the premises reserved by the government for its work upon the locks, but which was its regular landing place on its daily trips. The plaintiff seated himself in the cabin of the boat, and fell asleep, and while in that condition was struck on the head by a rock thrown from some blasts which were exploded by the defendants within 200 feet of the boat, and which broke through the roof of the cabin. For the injuries received from this blow the plaintiff seeks compensation.

The first trial of the case in the court below resulted in a judgment for the defendants. The case was then brought to this court upon writ of error (100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108), and the judgment was reversed, and the cause remanded for a new trial, upon the error of the court in refusing to instruct the jury, after admitting testimony as to an agreement between

the defendants and the navigation company that the latter used the wharf at its own peril, that, if such an agreement existed, it would not bind the plaintiff. This was the sole ground for reversal, but the court commented upon other points in the case as follows: "We agree with the learned judge of the court below where he said, in ruling upon the plaintiff's motion for a new trial (86 Fed. 62) that: 'The plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufferance or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work in which they were engaged. These passengers assumed all risks necessarily incident to such work prosecuted with skill and reasonable care—such care as is usually employed under like circumstances. They had a right to expect, and are presumed to have relied upon, this degree of care.' We also agree, contrary to the contention of the plaintiff in error, that the facts and circumstances of the case were such as to make it proper for the court below to submit to the jury the question of contributory negligence on the part of the plaintiff; and, in the main, we think the instructions given by the court below to the jury were quite as favorable to the plaintiff as they should have been, and in one respect perhaps too much so, namely, in submitting to the jury the question as to whether the defendants were in duty bound to cover their blasts, or to await the departure of the boat before firing them." 100 Fed. 241, 40 C. C. A. 366, 49 L. R. A. 108. In accordance with this decision, a second trial of the case was had in the court below, but no verdict was reached, as the jury could not agree. A third trial was then had, wherein the jury returned a verdict in favor of the plaintiff for \$2,000. The defendants moved that the verdict be set aside, and a new trial had, because of certain alleged errors in the instructions, and because of the insufficiency of the evidence to sustain the verdict. The court below granted the motion (117 Fed. 956), and upon the fourth trial, at the conclusion of the plaintiff's testimony, a nonsuit was granted. From the order directing a nonsuit an appeal is taken to this court.

G. W. Allen and A. S. Bennett, for plaintiff in error.

Dolph, Mallory, Simon & Gearin and Whitney L. Boise, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error relate solely to the action of the trial court in granting the defendants' motion for a nonsuit. The only question for determination is, therefore, whether or not the evidence introduced by the plaintiff was sufficient to sustain the plaintiff's case.

The negligence alleged in the complaint is the setting off of the blasts by the defendants at the particular time mentioned, when many persons were passing to and from the boat, and the failure of the defendants to give notice or warning to the plaintiff and others that they were about to do such blasting. It is admitted by counsel for plaintiff, in their brief, that the right of the defendants to blast in the prosecution of their work was paramount to the right of the public in using the river; and the Circuit Court of Appeals, upon the former hearing, established the law of the case in this regard, when it agreed with the ruling of the trial court that "the plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufferance or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work in which they were engaged." The testimony shows that it was the practice of the defendants to fire off

blasts at the noon hour, when most of the workmen were at dinner, and again at the close of the day's work. It was also the custom of the boat to arrive near the noon hour, and lie at the wharf for a period of time ranging from 45 minutes to 2 hours and more, during which time passengers were passing to and from the boat. The testimony is practically a unit in the statement that no cover was provided for the blasts, or any preparation made to prevent the rocks from flying in all directions. Under these circumstances the question of notice or warning to the general public that blasts were to be fired becomes of importance. Harry Martin testifies that he was in the employ of the defendants at the time in question, clearing up the beach at the lower end of the locks. He states that the "closest blasting was about 150 or 200 feet from the boat landing"; that he was about 125 feet from the blasting, and hurried to find shelter when the blast occurred; that he heard no word of warning given before the blasts were exploded, and saw no signal. Monroe Vallet testifies that he was on his way to the boat landing to take passage on the boat when the blasts occurred; that he was about 150 yards away, and heard no alarm given before the blasting. U. D. Kelly was on the boat as a passenger at the time, and was standing on the deck when he noticed a smoke beginning to rise from the works at the locks, about 150 feet distant, and, realizing that it indicated the touching off of a blast, immediately sought shelter in the cabin, and was near the plaintiff at the time he was injured. This witness testified that he heard no outcry or warning before the blasts were touched off, and saw no signals given. William Ruffeno, the steward of the boat, testified that he went onto the boat some five minutes before the blasting, and could see the place where the blasting occurred while walking to the boat. He was in the purser's office at the time of the accident, but heard no warning given, and saw no flag or signal as he came to the boat. John Young was a passenger on the boat, and was standing on the deck of the boat when the men employed at the locks went to dinner, and for 20 minutes before the blasting. He testified that three or four men stayed at the work, and one of them said "Look out!" in a moderately loud tone just as he touched off the blasts; that he did not wave his hands or give any other signal; that this man and the others there then got under shelter of carts and machinery, and the blasts occurred. S. Mosher, a passenger on the boat, testified that he was on the deck of the boat, talking with the witness Young, when the workmen left the locks for dinner, and noticed two or three men remaining at the pits; that he saw the blasts set off and the men run to shelter, and when the rocks began to fall he hastened inside the cabin. He did not hear any warning cry or see any signal given. The plaintiff testified that at the time he went on board the boat he knew nothing whatever about any blasting being done in the vicinity; that, after he had been on the boat for a little time, he heard something that he thought was blasting, but it seemed to him quite a distance away; that after a little talk with the steward, and a game of cards with some passengers, he sat down in the cabin on the upper deck, and fell into a doze; that while in that condition he was struck on the head by a rock, and rendered unconscious, with the injuries complained of resulting.

Was this failure to give notice to the persons in the vicinity, that blasts were about to be fired, negligence on the part of the defendants? This court held, when the case was previously before it, that the defendants had a right to prosecute the work in which they were engaged, and that the passengers upon this boat assumed all risks necessarily incident to the prosecution of the work, when such work was prosecuted with skill and reasonable care. Did the exercise of reasonable care require timely notice to be given before firing the blasts? There is no fixed standard by which a court can say that any particular act or omission is or is not reasonable or prudent. It must be considered with relation to the surrounding circumstances in each case. As stated by the Supreme Court in *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 683, 36 L. Ed. 485:

"The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court"—citing cases.

In our opinion, the question whether or not the defendants exercised reasonable care in the operation of blasting at the time and under the circumstances disclosed by the testimony was a proper one for the jury to determine, as well as the question of contributory negligence on the part of the plaintiff. The court below treated the testimony of the plaintiff to the effect that he knew that blasting was going on as conclusive against him on the question of notice. In this the learned judge fell into error, in our opinion. It is conceivable that reasonable men might say that in the prosecution of such work, under the circumstances disclosed by the record, some notice should be given of each separate and distinct blast fired in the immediate vicinity of people liable to be injured thereby.

For the reasons stated, we think the court erred in taking the case from the jury. The judgment is therefore reversed, and the cause remanded for a new trial in accordance with this opinion.

GILBERT, Circuit Judge (dissenting). The evidence, to my mind, clearly shows that the plaintiff in error had knowledge of the fact that blasting was going on before he went upon the boat. If so, he had knowledge of the fact concerning which it is charged in the complaint that the defendants in error failed to give notice. It must be borne in mind that the allegation of negligence concerning the failure to give notice was, not that the defendants in error failed to notify the plaintiff in error of the danger involved in the blasting, but merely failed to give notice of the fact that they were about to do the blasting. The allegation is that the defendants in error "negligently and carelessly omitted to give notice or warning to plaintiff and others that they were about to do said blasting." The plaintiff in error, on the first trial of the cause, testified as follows: "There was about twenty-

five or thirty passengers going up the stream, and I was going down, and the time of the hubbub of the people getting off the boat there was blasting at that time, so I understood. I heard some noise, and went in and sat down there, and the people went up the river." On the last trial of the cause he testified that after he had gone on board the boat, and had been there some 15 minutes, he heard some noise that sounded like blasting at a distance; but he admitted that his memory at that time was not very clear, and admitted also that he gave on the first trial the testimony above quoted. If he heard the noise of blasting, and understood that blasting was going on when he went on board the boat, he had all the knowledge of the fact that blasting was going on that could have been conveyed to him by any form of warning that the defendants in error might have adopted. Indeed, the sound of the blasting itself was the best form of notice that could be given. I think the judgment of the Circuit Court should be affirmed.

(128 Fed. 565.)

JEFFERSON HOTEL CO. v. WARREN.

(Circuit Court of Appeals, Second Circuit. February 29, 1904.)

No. 101.

1. FEDERAL COURTS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In the federal courts the burden is on the defendant to prove contributory negligence alleged as a defense by the preponderance of the evidence.

2. INNKEEPERS—GUESTS—BAGGAGE—DESTRUCTION BY FIRE—FAILURE TO SAVE—EVIDENCE.

In an action by a guest against an innkeeper to recover for baggage destroyed by fire while in the room which the guest was occupying, evidence *held* to authorize the submission to the jury of the question whether such guest was guilty of contributory negligence in failing to take measures to save the property before its destruction.

3. APPEAL—EVIDENCE—FAILURE TO OBJECT.

Evidence admitted without objection at the trial cannot be objected to on appeal.

4. INNKEEPERS—DESTRUCTION OF BAGGAGE—INSTRUCTIONS.

In an action against an innkeeper for baggage of a guest destroyed in his room by fire, an instruction that the guest had a right to rely to a large extent on statements made to him by the clerks and employés in the hotel, so far as the statements related to matters under their control, and that he had a right to rely on their statements as to the extent of the fire, not fully as experts, but within the bounds of reason, if under the circumstances he was justified in paying attention to their statements, etc., but that such statements would not exonerate him from the exercise of his intelligence, was not objectionable, as authorizing the guest to rely exclusively on such statements.

5. SAME—EVIDENCE—STATEMENT OF CLERK.

In an action for the destruction of a guest's baggage in a hotel fire, evidence that, on the guest complaining to the clerk that he did not desire a room as high as the fourth floor, the clerk assured him that the hotel was fireproof, was admissible.

6. SAME.

Where, in an action for loss of a guest's baggage in a hotel fire, the court had previously charged that plaintiff was not entitled to rely on statements made by people in the hall of the hotel, who were not officially connected therewith, as to the extent of the fire, an instruction that plain-

tiff was not justified in relying on any statements made by people in the hall, as they were only expressions of opinion, and not binding on the defendant unless the statements were made by servants of the defendant or persons in charge of the hotel, was not error.

7. APPEAL—REVIEW—NEW TRIAL—VACATION OF VERDICT—MOTIONS.

The denial of a motion to set aside a verdict and for a new trial in the federal court presents no question which can be reviewed by the Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the Northern District of New York.

On writ of error to the Circuit Court for the Northern District of New York, to review a judgment in favor of the defendant in error (plaintiff below) against the plaintiff in error (defendant below) for \$3,519.67, entered March 12, 1903, upon the verdict of a jury.

Frederick R. Kellogg, for plaintiff in error.

George B. Wellington, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts, briefly stated, are as follows: On March 28, 1901, the plaintiff below and his wife became the guests of the Jefferson Hotel at the City of Richmond, Virginia. They were assigned to room No. 418, upon the fourth floor of the hotel. The plaintiff objected to being located so high up on account of fire where-upon the room clerk, who stood behind the desk in the office, replied, "That is all right; the house is fireproof." The plaintiff replied, "Very well; I will go up." Soon afterwards the luggage of the plaintiff and his wife, consisting of four trunks and some hand bags, was taken to their room. The next night, March 29th, they retired about 10 o'clock. They were awakened by the odor of smoke in the room, which they supposed came from an open window. There was at this time some noise in the corridor outside the room. The plaintiff lay awake for some little time when he heard a man exclaim excitedly, "Bring an axe." At this he arose hurriedly and opened the door. There was a man, several bell boys and some trifling smoke in the hall. The plaintiff supposed that the man was the porter of the hotel. In answer to the plaintiff's question, "What's the matter?" the porter said, "There has been a fire in one of the rooms and it is entirely under control now." Another man who was standing there said, "It is all right." The plaintiff asked, "Are you sure there is no danger?" and he said, "No; there is none; it will not be necessary to remove your things; don't get excited." There was no smoke in the plaintiff's room, but after a while some one knocked at the door and said, "The smoke is getting very thick, you had better get out." The plaintiff opened the door, found that the smoke was increasing and asked the person who had knocked if there were any danger. This person replied, "No, but the smoke is pretty thick and it will be disagreeable." The plaintiff and his wife dressed hurriedly and went to the room of Mrs. Warren's maid, some two hundred feet away, in the same corridor. After leaving Mrs. Warren at this room the plaintiff went back to his own room and locked the door; the trunks had previously been locked. He re-

turned to the maid's room and remained there for eight or ten minutes when all three went downstairs. After remaining downstairs a few minutes and observing that people were coming down, some with their hand luggage, the plaintiff went back to the maid's room and brought her trunks downstairs. At this time the smoke was so dense in the corridor towards the plaintiff's room that he did not make any attempt to go there believing it to be unsafe. That part of the hotel in which the plaintiff's room was located was burned and his luggage was destroyed. The action is to recover the value of the lost luggage.

No question is here argued as to the negligence of the defendant. For the purpose of this review the defendant's negligence is admitted and the testimony bearing thereon has not been incorporated in the record. It is argued, however, that the contributory negligence of the plaintiff is established as matter of law and that the court should have directed a verdict for the defendant upon this ground. We are clearly of the opinion that the trial court was right in submitting this question to the jury and especially so in a tribunal where the burden rests upon the defendant to establish the plaintiff's negligence by a preponderance of evidence. *Inland & Seaboard Co. v. Tolson*, 139 U. S. 551, 557, 11 Sup. Ct. 653, 35 L. Ed. 270; *Texas & P. Ry. Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78.

We think the fundamental error in defendant's contention is the implied assumption that the plaintiff and defendant stood upon equal terms as to knowledge of the conditions existing on the night of the fire and that the former knew, or should have known, that danger was imminent from the very first alarm. If we start with the assumption that the plaintiff knew that the fire started in the room directly opposite his own, that it was never under control, that the hotel was not fireproof and that the persons who assured him of safety had no knowledge of the facts, there would be great force in the argument that his fault contributed to the loss he sustained. Such assumption is, however, not in accordance with the testimony. The plaintiff's conduct should be viewed in the light of existing facts. He was called upon to act only as a prudent man would act in such circumstances. He was a stranger in a strange hotel; he was awakened at night by an alarm of fire; he had previously been assured that the hotel was fireproof. On coming out into the corridor he was told by persons, apparently in authority, that there was no danger and that the fire was out or completely under control. He was requested not to get excited and create a disturbance as it might cause a panic among the other guests. When the plaintiff finally became convinced that the danger was serious the smoke was so dense that he did not deem it prudent to attempt to reach his room. Would the court have been justified in holding as matter of law that it was incumbent upon the plaintiff, the moment he was informed that there was a fire somewhere in the house, to begin the removal of the four trunks from the fourth story to the street? It is thought not. The theory that the plaintiff was not justified in giving any credence whatever to the statements of the persons in the hotel corridors until he had instituted an investigation to ascertain the nature of their employment, and whether they possessed expert knowledge on the subject of fires, is too tech-

nical and refined for application to the ordinary affairs of life. The defendant's argument might with great propriety be addressed to the jury and had they found a verdict for the defendant on this issue it would not have been set aside as against the evidence. But the question on the proof is one of fact and not of law and was properly submitted to the jury.

The proposition that the representations made by persons in the hotel corridor that the fire was under control and that there was no danger, were inadmissible, is disposed of by the fact that they were received without objection or exception.

But it is argued that the plaintiff was not permitted "to rely exclusively" upon these statements and having done so his conduct is conclusive evidence of negligence. It is said that this point is presented by exceptions taken to various requests to charge made by the defendant.

The fifteenth request fully discloses the position of the court in this respect. It is as follows:

"That a hotel guest, in an emergency caused by an accidental fire, is not justified in remaining quiet and making no effort to himself save his property by his reliance upon a statement alleged to have been made by some other person or persons, whether servants of the hotel or not, to the effect that no danger existed, as such statements are mere matters of opinion and there is no duty resting upon a hotel keeper or his servants to give opinions on such subjects to their guests; and moreover, as such an opinion, in order to be accurate, would call for special experience and knowledge as to the nature of fires and danger from them which a hotel keeper and his servants do not ordinarily possess and are not ordinarily expected to possess.

"The Court: I cannot so charge. It is my duty to say that the guests in a hotel have the right, in the exercise of intelligence and due care, to rely to some extent and to a large extent, under ordinary circumstances, upon the statements made to them by the clerks and employees in the hotel attending to certain parts of the business, so far as the statements relate to the matters under their control. They are there for that purpose among others. And when it comes to a question of fire, and what the conditions are, the guest has a right to rely upon what they say to some extent, not fully, not as experts, but still what they say to the guests within the bounds of reason and common sense, the guests are protected in paying attention to, if under all the circumstances of the case the jury believed they were justified in paying attention to what was said to them. It does not, however, exonerate the guest from the exercise of his intelligence. But it is for the jury to say whether the plaintiff was negligent, considering all the circumstances, in paying attention to and relying upon the statements of this nature."

It will be observed that this is a very different proposition from the one stated above. The court instructed the jury not that the plaintiff had a right to rely exclusively upon the statements of employees but only to some extent and within the bounds of reason and common sense. We think the instruction is not open to the defendant's criticism.

There was an exception to the admission of the statement of the clerk as to the fireproof character of the hotel, but it does not appear to be relied on in the defendant's briefs. In any view we think the testimony competent within the following authorities: *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1048; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *The Normannia* (D. C.) 62 Fed. 469, 479.

The defendant lays particular stress upon the exception to the court's refusal to charge the twenty-ninth request, which was as follows:

"That the plaintiff was not justified in relying on any statements made by people in the hall, as they were only expressions of opinion and not binding on the defendant. The Court: I so charge, unless the statements were made by servants or defendant or persons in charge of the hotel."

In the assignment of errors the language of the court is quoted thus:

"I so charge, unless the statements were made by servants or persons in charge of the hotel."

The difference is apparent. It is not improbable, however, that the word "or" as it appears in the bill of exceptions is a typographical error and should be "of," so that the charge should read:

"I so charge, unless the statements were made by servants of defendant or persons in charge of the hotel."

This is the view most favorable to the defendant and we shall regard the charge as so amended.

It is insisted that this charge was grave error and was tantamount to saying that the plaintiff was justified in relying upon any statements, even though expressions of opinion, made by servants or persons in charge of the hotel, as binding on the defendant. It must be remembered that this was one of, at least, 32 requests which the court was asked to consider after he had already covered almost every conceivable phase of the controversy by his previous remarks. The language in question must be construed in the light of the testimony and of the instructions already given. The jury were distinctly told that the plaintiff was not permitted to rely upon statements made by people in the hall who were not officially connected with the hotel. So far the charge was highly favorable to the defendant. The court then proceeded to qualify the broad statement by saying that the plaintiff was justified in relying upon statements made by defendant's servants or persons in charge of the hotel. So that in order to make the qualifying words applicable the jury were required to find that the statements came from such servants. In other words, the practical result of the instruction was that if the jury believed that the person who gave the first assurances of safety was the hotel porter, the plaintiff was justified in relying upon his statements, but not upon the statements of any other person. As before observed the court had previously cautioned the jury that the plaintiff was not permitted to place implicit reliance upon these statements, but that they might be considered to some extent as bearing upon his conduct.

The denial of the motion to set aside the verdict and for a new trial presents no question which this court can consider. *Central Vermont R. Co. v. Bateman*, 75 Fed. 1021, 20 C. C. A. 679.

The judgment is affirmed, with costs.

(128 Fed. 591.)

THE GLADESTRY.

(Circuit Court of Appeals, Second Circuit. February 23, 1904.)

No. 167.

1. FEDERAL COURTS—APPEAL—FINDINGS OF TRIAL JUDGE—CONCLUSIVENESS.

Where an action was tried before the District Judge, who saw all the witnesses, his findings of fact will be followed on appeal.

2. MASTER AND SERVANT—SERVANTS OF SEPARATE MASTERS IN SAME WORK—FELLOW SERVANTS.

A firm of stevedores contracted to discharge and load a vessel, being required to furnish all labor and appliances, except that the ship was to furnish winches and winchmen. Plaintiff, a servant of the stevedores, was injured by the negligence of the winchman in failing to obey an order to reverse the winch. *Held*, that the winchman, not being under the control of the stevedores, was not plaintiff's fellow servant, so as to preclude plaintiff from recovering for his negligence.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, in favor of libelant for damages from personal injuries. 124 Fed. 112. The libelant was engaged as a stevedore, working in the employ of the firm of Wilson & Irvine, in discharging a cargo of logs from hatch No. 4 of the steamship Gladestry. The winch which was used in connection with the work was furnished by the ship and run by one of her crew. It was charged that the winchman was negligent in that, when the gangwayman sang out to him to "come back" (i. e., to reverse the winch), he went ahead with it, whereby the libelant's finger was crushed.

J. Parker Kirlin, for appellant.
Fredk. B. Bailey, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The libelant, the gangwayman, and a fellow workman all testified to the winchman's failure to obey the order given. The latter testifies that he conformed to whatever order he received. The cause was tried before the District Judge, who saw all the witnesses, and his findings of fact will be followed here.

It is contended that the winchman was a fellow servant with the libelant. There was a similar contention in *The S. S. Slingsby*, 120 Fed. 748, 57 C. C. A. 52, where the point was quite fully discussed, and the conclusion reached that upon the facts of that case the winchman did not become *pro hac vice* the servant of the firm of stevedores. The important piece of evidence in that case, as will be seen from the opinion, was the contract under which the work was being done. By its terms the stevedores agreed to "discharge and load," and the owners of the steamship agreed to "furnish winches and drivers [i. e., winchmen]." The contract in the case at bar is to the same effect;

† 2. Who are fellow servants, see notes to *Railroad Co. v. Smith*, 8 C. C. A. 608; *Railway Co. v. Johnston*, 9 C. C. A. 596; *Flippin v. Kimball*, 31 C. C. A. 286. Negligence of employé of independent contractor, see note to *Transport Co. v. Coneys*, 28 C. C. A. 392.

See *Master and Servant*, vol. 34, Cent. Dig. § 485.

its language is, "the ship to furnish steam winchmen, falls and slings." There has been an effort to differentiate the case at bar by the testimony of one of the firm of stevedores as to what he understood he had a right to do under this contract, and as to what he had been allowed to do under similar contracts with other parties, but it is unimportant. Under the contract the ship retained the power to select and remove winchmen, and the case cannot be distinguished from that of *The Slingsby*.

The decree is affirmed, with interest and costs.

(128 Fed. 592.)

SING TUCK et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 2, 1904.)

No. 177.

1. CITIZENS—NATIVE CHINESE.

A child born in the United States of Chinese parents, who at the time were Chinese subjects, but who had a permanent domicile and residence in the United States, and were not employed in any diplomatic or official capacity under the Chinese Emperor, became at birth a United States citizen.

2. SAME—EXCLUSION—HABEAS CORPUS.

Where an alleged Chinese alien, apprehended in deportation proceedings, establishes a *prima facie* case of citizenship, he is entitled to have the legality of his detention judicially determined on habeas corpus, notwithstanding Act Cong. Aug. 18, 1894 (chapter 301, § 1, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303]), declares that the determination of the immigration officers shall be final, unless reversed on appeal to the Secretary of the Treasury.

Appeal from the Circuit Court of the United States for the Northern District of New York.

For opinion below, see 126 Fed. 386.

This cause comes here upon appeal from a decision of the Circuit Court, Northern District of New York, dismissing a writ of habeas corpus. The petitioners were Chinese persons seeking to enter the United States. They were stopped by the immigration officers, who, upon examination and inquiry, decided that they were not entitled to enter, and held them for deportation when the writ of habeas corpus was issued. The petition for the writ avers that the petitioners, although Chinese persons, were born in the United States, and are citizens thereof. The returns to the writ showed that such examination had been made, and such decision (unreversed on appeal to the Secretary of Commerce) had been arrived at. The Circuit Court held that "judgment has been passed by those officers competent and duly authorized and having jurisdiction to pronounce it, and this court is without power in this proceeding to annul or reverse it," and dismissed the writs.

R. M. Moore, for appellants.

Geo. B. Curtiss, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

¶ 1. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332. See *Aliens*, vol. 2, Cent. Dig. § 83.

LACOMBE, Circuit Judge. The statutes relating to Chinese immigration provide a method whereby all Chinese persons seeking to enter the United States shall be examined by executive officers touching their right so to enter. It is also provided in the act of August 18, 1894 (chapter 301, § 1, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303]), that "in every case where an alien is excluded from admission into the United States * * * the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." It is settled by the decision in *U. S. v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890, that a child born in the United States of parents of Chinese descent, who at the time of his birth were subjects of the Emperor of China, but had a permanent domicile and residence in the United States, and were not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States.

In *Gee Fook Sing v. U. S.*, 49 Fed. 146, 1 C. C. A. 211, the Circuit Court of Appeals in the Ninth Circuit held that "the laws excluding immigrants who are Chinese laborers are inapplicable to a person born in this country * * *; that any person alleging himself to be a citizen of the United States, and desiring to return to his country from a foreign land, and that he is prevented from doing so without due process of law, and who on that ground applies to any United States court for a writ of habeas corpus, is entitled to have a hearing and a judicial determination of the facts so alleged; and that no act of Congress can be understood or construed as a bar to such hearing and judicial determination." In this opinion we fully concur. We need not enter into the discussion of any constitutional questions presented on the briefs (and which do not come before this court for review). We are satisfied that, however broad the language of the exclusion acts may be, it was not within the intent of Congress to submit the right of a native-born citizen of the United States to return to the land of his birth, to the final determination of executive officers. When, therefore, a Chinese citizen of the United States is deprived of his liberty by an executive officer who is about to deport him, we are of the opinion that he is entitled to apply to the federal court for a habeas corpus to inquire into the cause of his detention. To entitle himself to such writ he must, of course, satisfy the court that he can at least make out a *prima facie* case in support of the proposition that he is a citizen. But when he has done that, and the writ has issued, he is not precluded from insisting upon a judicial investigation of the issue on any theory that the decision of the immigration officers is final, or that he has failed to conform to some of the regulations required in the case of Chinese persons who are aliens.

The order of the Circuit Court is reversed, and cause remanded for inquiry into the status of the individual relators. This disposition of the cause is not to be taken as an expression of opinion as to whether in any of the cases a *prima facie* case even was made out by petitioner.

It has been suggested that this decision will affect a large number of pending causes, and will seriously interfere with the execution of the Chinese exclusion laws in the district. If the district attorney wishes to apply to the Supreme Court for a certiorari, the mandate will be held until he shall have had a reasonable opportunity so to do.

(126 Fed. 619.)

FLETCHER v. BURT.

(Circuit Court of Appeals, Sixth Circuit. December 18, 1903.)

No. 1,175.

1. REMOVAL OF CAUSES—PROCEDURE AFTER REMOVAL—REFORMING PLEADINGS.

Where an action brought in a state court under a Code which abolishes forms of action is removed into a federal court, where different modes of procedure obtain in cases at law and in equity, it becomes necessary to determine the nature of the case, and to assign it to the law or equity side of the court accordingly, and to reframe the pleadings if necessary.

2. PARTIES—JOINDER OF CAUSES OF ACTION—FEDERAL COURTS.

A bondholder of an insolvent railroad company whose property has been sold in foreclosure proceedings, suing on behalf of himself and other bondholders, stockholders, and general creditors, cannot maintain an action at law in a federal court to recover a judgment for damages against a former receiver for alleged fraudulent acts in depreciating the value of the property prior to the sale, and the rule is not changed by the fact that the action was instituted in a state court under a Code which abolishes all forms of action, and adopts the equity rule as to parties and the joinder of causes of action.

3. REMOVAL OF CAUSES—ELECTION OF PLAINTIFF AS TO FORM OF ACTION.

On the removal of a cause instituted as one at law to recover a judgment for damages, but which is not maintainable as such in the federal court, where a demurrer on that ground was rightly sustained, and the plaintiff declined to amend his pleading to bring the case into the equity side of the court, but sued out a writ of error, he is bound by his election, and the judgment dismissing his action will be affirmed.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

The plaintiff in error, Austin B. Fletcher, brought this suit by petition in the court of common pleas of Lucas county, Ohio, for the benefit of himself and the general creditors and stockholders of the Toledo, Ann Arbor & North Michigan Railway Company, and of all the bondholders of said company who did not participate in a certain reorganization scheme of said company, mentioned in said petition, against Wellington R. Burt, who had been receiver in a consolidated cause composed of suits which had been brought for foreclosure of mortgages and by creditors of the railway company in the Circuit Court of the United States for the Northern District of Ohio. The plaintiff alleged that at the time of the alleged fraudulent acts of the defendant of which he complained he was the owner of two bonds, for \$1,000 each, which were assumed by the railway company upon a consolidation of railroad companies, whereby the said railway company had been constituted, and also of sixteen other bonds, of \$1,000 each, issued by the railway company after the consolidation.

The gravamen of the petition was, in substance, without going more minutely into particulars, that the defendant, while he was receiver, foreseeing that the railroad of the company would be sold under the decree of the court in said cause, and in contemplation of a scheme of reorganization by those who were interested in said company, himself among them, to be formed

¶ 1. See note at end of case.

for the purpose of taking over by purchase at the sale the mortgaged assets of the company, undertook to and did depreciate the value of those assets by representing to the public, and especially to intending purchasers, that they were worth but little, that the railroad consisted of "a couple of streaks of rust running across Michigan, and a part of it under water," and making other like representations in regard to the condition and value of the property, all which had the effect to dissuade purchasers from bidding at the sale, whereby the property, which was worth and ought to have brought \$10,000,000, was bid in by those engaged in the scheme of reorganization for the sum of \$2,627,000, all of which was absorbed by the preferred creditors, the general creditors and stockholders receiving nothing, and that the sale was confirmed. It was also alleged in the petition that the defendant, while he was receiver, purchased some of the bonds of the company, which went to his credit in the reorganization, whereas they should have been treated as held in trust by him for the company. And it was further alleged that while acting as receiver the defendant, without the knowledge of the court, appropriated his receipts to the permanent improvement of the property, among other things to the construction of 12 miles of new railroad, the cost of which was reported to the court as operating expenses. All these improvements it is charged were concealed from the public and intending purchasers, but went into the sale to the benefit of the defendant and his associates. Further, the petition charged that the defendant, while receiver, systematically managed the road in a way and for the purpose of ruining its reputation and impairing its selling value. The plaintiff states that he and those whom he represents were entirely ignorant of the fraudulent acts complained of until three years and three months before the filing of the petition. He alleges that he and they were damaged to the extent of \$5,000,000, and demands judgment for that sum.

The defendant appeared and removed the cause into the Circuit Court of the United States upon a petition showing diverse citizenship of the parties. Thereupon the defendant filed a demurrer to the petition showing the following grounds: "First, the plaintiff has no legal capacity to maintain this action; second, that there is a defect of parties plaintiff; third, that several causes of action are improperly joined; fourth, that the matters and things set forth in the petition are of purely equitable cognizance, and no action at law will lie thereon against the defendant; fifth, that the petition does not state facts sufficient to constitute a cause of action against this defendant."

The court on the hearing sustained the demurrer, and entered the following order: "And thereupon, the plaintiff not asking to plead further, it is considered and ordered by the court that said petition be, and the same is hereby, dismissed, and the defendant go hence without day; and it is further ordered that said plaintiff, Austin B. Fletcher, pay all the costs in this case, taxed at \$—, for which execution is awarded." The plaintiff thereupon sued out a writ of error to this court.

Charles S. Ashley and Harvey Scribner, for plaintiff in error.

Alexander L. Smith, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

The petition in this case, although conforming to the regulations of the Code of Ohio respecting pleadings, is in the similitude of the common-law declaration in an action of trespass on the case, and demands a judgment for damages alleged to have been sustained by the plaintiff and those whom he claims to represent in consequence of the wrongful acts of the defendant set out in the petition.

The joinder of the causes of action which the plaintiff claims for himself and those he represents is supposed to be authorized by section 5008 of the Revised Statutes of Ohio, which reads as follows:

"When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

It is contended that this provision extends to all civil actions, whether brought to enforce an equitable or a legal right, and the case of *Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. 735, is cited by counsel for the plaintiff in support of that contention. For the defendant it is contended that the operation of this statutory provision is limited to those cases where by the rules and practice of the court of chancery such representation of parties not otherwise before the court was permissible, and reference is made to other decisions of the Supreme Court of Ohio, which are thought to support that view. *Trustees, etc., v. Thoman*, 51 Ohio St. 285, 37 N. E. 523; *Quinlan v. Myers*, 29 Ohio St. 500, 508.

In view of the fact that notwithstanding all distinctions in matters of form in pleading are obliterated by the Code, and all causes of action, whether legal or equitable in their nature, are presented in a common form of statement, the necessity for making the distinction arises in determining the mode of trial; for causes of action of a legal nature are in Ohio tried by a jury, while causes resting upon the principles of equity are tried by the court. But the verdict of a jury upon such a petition as this, for instance, would be wholly inadequate to accomplish the ultimate purpose or to settle the variety of issues that might arise within the boundaries of the case. But it is said that it might bring the fund into court, and then the court might distribute it to those entitled. But in a court of equity both these results are attained in a single suit. From the elasticity of its procedure it could in the same procedure determine all incidental issues, and thus avoid a multiplicity of suits. But we shall not undertake to decide whether or not the statute referred to authorizes such a method of proceeding as this, which is an action to recover a judgment for damages merely, to be ascertained upon the principles of the common law; for if it were conceded that under this provision of the Code of Ohio, construed as the plaintiff claims it should be, the suit might go on in the courts of the state, yet the provision would be of no force or effect after it was removed into the federal court. When the cause was brought there it came into a forum where different modes of procedure obtain in cases at law and in equity, and it became necessary to determine the nature of the case, and assign it to the law or to the equity side of the court accordingly, and to re-frame the pleadings if necessary. It is impossible for a state statute to prescribe a practice which will require the federal courts to ignore the distinction between law and equity—a distinction as old as are the courts themselves. The latter courts must deal with the case in recognition of this distinction. They cannot, sitting as courts of equity, try an action at law, nor, sitting as courts of law, proceed by the methods of equity or administer equitable remedies. The cases upon this subject are so numerous as hardly to justify citation, but we refer to a few: *Thompson v. Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765; *Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. Ed. 569; *McConnell v. Assur. Soc.*, 16 C. C. A. 172, 69 Fed. 113; *Goodyear Shoe*

Mfg. Co. v. Dancel, 56 C. C. A. 300, 119 Fed. 692. But the plaintiff from the beginning has insisted upon his right to a legal remedy and a trial by jury. He demanded a judgment for damages. In the Circuit Court the case was docketed as a law case. After the removal, the plaintiff took no action to bring his case into the equity side of the court; but, although one of the grounds of the demurrer was that the case was one of equitable cognizance and the plaintiff was given the right to plead further, he elected to stand by his pleading as one at law, and brought the case here on writ of error, whereon this court can deal only with questions of law, predominant among which is the one whether in a federal court of law the plaintiff can maintain a suit so constituted at all, conceding the facts to be as alleged. He had the technical right to pursue this course, and obtain the judgment of the court upon his own theory. In a former case (*McConnell v. Provident Life Assurance Society*, supra), brought to this court by appeal from a decree in a suit begun in a state court to recover the amount claimed to be due on a policy of insurance where the court below had tried the case on the equity side pursuant to a method prescribed by a statute of Tennessee, under a misapprehension of the court and counsel, we reversed the decree, and remanded the case, with directions to permit the plaintiff to reframe his pleadings and resort to the law side of the court. But in that case no question had been raised in the court below upon the question here involved. The plaintiff had made no distinct election, and the statute of limitations would have barred a writ of error. It is not contended, nor could it be, that an action such as this could have been originally prosecuted as a suit at law in the Circuit Court of the United States; but it is claimed that by the privilege accorded by the state law he could so prosecute it in the state courts, and that the same privilege attended him on the removal. He invoked the exercise of the jurisdiction of the federal court upon his action as a court of law, and that court could not do otherwise than to deal with it in that capacity, and, consistently with the law governing it, it properly held that the suit could not be maintained.

The assignment of errors, which are all leveled at the judgment itself, must therefore fail. It would be manifestly out of place for us to enter upon the merits of the case.

The judgment is affirmed.

NOTE.

Distinctions between Legal and Equitable Remedies in Actions Removed to Federal Courts.

[a] (U. S. 1859) Where the pleadings in a suit commenced in a state court have been framed in accordance with the practice prescribed by the Code of the state, the federal court, on the removal of the cause to it, will proceed to adjudicate the same from such pleadings and proof, where it is enabled to ascertain therefrom the matter in dispute between the parties, though such pleadings do not conform to the mode of proceedings prescribed for the United States courts in equity suits.—*Gridley v. Westbrook*, 64 U. S. (23 How.) 503, 16 L. Ed. 412.

[b] (U. S. 1867) Though state legislatures may abolish, in state courts, the distinction between actions of law and actions in equity, by enacting that there shall be but one form of action, which shall be called "a civil action," yet the distinction between the two sorts of proceedings cannot be thereby obliterated

in the federal courts. Hence, if the civil action brought in the state courts is essentially, as hitherto understood, a suit at common law, the common-law form, and not an equitable one, must be pursued if the case is removed into a federal court. Nor does the fact that by statute in the state courts "the real parties in interest" must bring the suit, whereas in the federal courts, in a common-law suit, such as was presented in the civil action brought in the state courts, one party would sue to the use of another, change this rule. A plaintiff in the state court may remain plaintiff on the record in the federal court, and prosecute his suit in that court as he is authorized by state laws to prosecute it in the state courts.—*Thompson v. Central Ohio R. R. Co.*, 73 U. S. (6 Wall.) 134, 18 L. Ed. 765.

[c] (U. S. 1867) Where an action was maintainable as a legal action in the state court, it is equally so maintainable when removed, and plaintiffs cannot deprive defendant of a trial by jury by transferring what was really an action at law into a suit in equity.—*Thompson v. Central Ohio R. R. Co.*, 73 U. S. (6 Wall.) 134, 18 L. Ed. 765.

[d] (U. S. 1879) Where a union of legal and equitable causes of action in one suit is allowed by the laws of the state where an action is brought, such union is not permissible on a removal of the cause to a court, since it is forbidden by Act May 8, 1792, § 2 (1 Stat. 276), which is substantially re-enacted in Rev. St. § 913 [U. S. Comp. St. 1901, p. 683].—*Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. Ed. 569.

[e] (U. S. 1887) Where, in an action for conversion, an equitable as well as a legal defense has been set up in a state court, on removal of the cause to a United States Circuit Court the equitable defense is not available.—*Northern Pac. R. Co. v. Paine*, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513.

[f] (U. S. 1893) In an action by a payee of notes on a covenant by a vendee with his vendor to pay them, where the proceeding was begun in the state court, and is removed to the United States Circuit Court, it will proceed therein as an action at law, as it would have done in the state court, and the jurisdiction is not affected by stipulations between the parties.—*North Alabama Development Co. v. Orman*, 55 Fed. 18, 5 C. C. A. 22, affirming judgment *Orman v. North Alabama Development Co.* (C. C. 1892) 53 Fed. 469.

[g] (U. S. 1855) On the removal of a case from the state to the federal court, where the state has abolished the ancient forms of action and the distinctions between actions at law and suits in equity, while the plaintiff in such action will be required to show a cause of action, the federal court will not hold him to a technical observance of forms, so far as the mere title of the action is concerned.—*Toucey v. Bowen*, Fed. Cas. No. 14,107 [1 Biss. 81].

[h] (U. S. 1871) A declaration filed in the federal court, after removal of a bill in equity from a state court, asking relief at law against some only of the defendants, if within the allegations of the complaint filed in the state court, will not be stricken from the files, nor will complainants be compelled to elect whether to proceed at law or in equity.—*Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,829 [8 Blatchf. 299].

[i] (U. S. 1879) Where legal and equitable relief is sought by the same pleading in the state court, plaintiff must replead after removal.—*La Mothe Mfg. Co. v. National Tube Works Co.*, Fed. Cas. No. 8,033.

[j] (U. S. 1882) Where the distinctions between legal and equitable procedure are done away with and an action is removed, it is removed to that side of the court where the appropriate relief can be obtained.—*Benedict v. Williams* (C. C.) 10 Fed. 208, 20 Blatchf. 276.

[k] (U. S. 1882) The assignee of the cause of action having properly brought suit in his own name, in the state courts, can proceed with it after its removal only on the equity side of the Circuit Court; his right being strictly cognizable in his own name in a court of equity only.—*Benedict v. Williams* (C. C.) 11 Fed. 547.

[l] (U. S. 1883) Where a suit at common law has been removed from a state court in which it has been conducted under the forms of procedure belonging to a court of equity, the Constitution and laws of the United States require that there must be a repleading to conform to the practice of the federal court, as a court of law.—*Whittenton Mfg. Co. v. Memphis & O. R. Packet Co.* (C. C.) 19 Fed. 273.

[m] (U. S. 1883) It is only by this construction of the removal acts that the distinctions between law and equity jurisdiction can be observed in practice, and that uniformity secured which it is plainly their intention to enforce. There cannot be one practice for causes removed from the state courts and another for suits originally commenced in the federal court.—*Whittenton Mfg. Co. v. Memphis & O. R. Packet Co.* (C. C.) 19 Fed. 273.

[n] (U. S. 1883) This repleading may require more than one suit, and on both sides of the docket, but this is unavoidable in a jurisdiction keeping up as persistently as the federal laws do the distinctions between law and equity; and the force and effect of the proceedings in the state court are preserved by molding them to suit the requirements of the case in the process of distribution between the two jurisdictions.—*Whittenton Mfg. Co. v. Memphis & O. R. Packet Co.* (C. C.) 19 Fed. 273.

[o] (U. S.) Where the suit in the state court unites legal and equitable grounds of relief or of defense, as authorized by the state statute, it may, in a federal court, be recast into two cases, one at law and one in equity, and in such a case a repleader is necessary.—(1885) *Perkins v. Hendryx* (C. C.) 23 Fed. 418; (1886) *Phelps v. Elliott* (C. C.) 26 Fed. 881, 23 Blatchf. 470.

[p] (U. S. 1885) Where a suit, embracing both an equitable and legal cause of action, is instituted in a state court and removed to a federal court, and the equitable cause of action stated is held bad on demurrer, the bill will be dismissed, and the complainant left to pursue his remedy at law.—*Pilla v. German School Ass'n* (C. C.) 23 Fed. 700, appeal dismissed (1888) 131 U. S. 443, 9 Sup. Ct. 801, 33 L. Ed. 216.

[q] (U. S. 1886) Where a case comes from a state court as one case, of which the circuit court has jurisdiction, that court does not lose jurisdiction because one part of the case has to be tried on the equity side, and the other part on the law side, of the court.—*Lacroix v. Lyons* (C. C.) 27 Fed. 403.

[r] (U. S. 1886) Where a complaint asking both damages and equitable relief against a vendor's fraudulent sale of real and personal property is removed to a federal court, and a bill in equity is filed therein for the equitable relief, and is tried, the action at law is not abandoned by the repleader, but remains on the common-law side of the court.—*Schneider v. Foote* (C. C.) 27 Fed. 581, 23 Blatchf. 511.

[s] (U. S. 1888) In an action at law on a policy of insurance, brought in a state court, it appeared from the petition that the person named in the policy as the assured was not the real party in interest. A demurrer on this ground was sustained, after removal of the cause to the United States Circuit Court, but the court granted leave to plaintiffs to file a bill in equity for reformation of the contract, and continued the action at law, pending the proceedings in equity. *Held*, that such order was not contrary to the provision of the policy that no action could be maintained thereon unless brought within six months after the happening of the loss. Had the cause remained in the state court, the petition could have been amended, and the defendant could not complain of the proceeding in equity rendered necessary by its removal of the cause to the federal court.—*Rosenbaum v. Council Bluffs Ins. Co.* (C. C.) 37 Fed. 7, 3 L. R. A. 189.

[t] (U. S. 1896) Where, by the statutes of a state, equitable defenses may be made to an action at law, and such an action is removed into the federal court, matters in law and matters in equity must be separated, and equitable relief must be sought in a separate suit.—*In re Foley* (C. C.) 76 Fed. 390.

[u] (U. S. 1900) A suit to enforce a mechanic's lien is essentially one in equity, and, on its removal to a federal court, is properly triable as such, although it was instituted as an action at law, as permitted by the state practice.—*Hooen, Owens & Rentschler Co. v. Featherstone*, 99 Fed. 180.

[v] (U. S. 1902) Legal and equitable defenses may not be joined in a suit transferred to a federal court, where the practice in law and equity is not the same.—*Pettus v. Smith*, 117 Fed. 967.

(128 Fed. 553.)

WARNER et al. v. COCHRANE.

(Circuit Court of Appeals, Second Circuit. March 11, 1904.)

No. 112.

1. LEASES—COVENANT AGAINST ASSIGNMENT—BREACH—WAIVER.

Where a lessor, with knowledge that her lessees had assigned the lease in violation of a covenant against such assignment, conducted various correspondence with the assignee, and treated it as her tenant, and made no objection until after the lessees had changed their position to their prejudice, and deprived themselves of the ability to perform an option of renewal contained in the lease, the lessor was estopped to deny that she had consented to such assignment.

2. SAME—DEMAND FOR RENEWAL.

Where an assignment of a lease containing a covenant of renewal was valid as against the lessor, a demand for such renewal was properly made by the assignee to whom such covenant to renew passed by the assignment.

3. SAME—CONCURRENT CONDITIONS.

A lease of asphalt land provided that if, on or before July 1, 1900, the lessees should not have paid royalty on 34,000 tons of asphalt at the rate fixed, they should pay to the lessor on such day royalty equal to the difference between the royalty paid and that payable on that number of tons, and if at that time the lessees should have performed all the conditions contained in the lease, the lessor covenanted to renew the lease at the lessees' option. *Held*, that the conditions for renewal and payment were concurrent, and the lessor, having refused to renew, was not entitled to recover the differential payment provided for.

4. SAME—REMEDIES—ELECTION.

Where a lease of asphalt land provided for a renewal concurrently on the payment by the lessees of a sum equal to the difference between the royalty paid and that which would be payable on a specified number of tons of asphalt, and the lessor wrongfully refused to make such renewals, the lessees or their assignees were at liberty either to tender such differential rent and insist on specific performance of the covenant to renew, or refuse payment, and treat the contract as at an end.

In Error to the Circuit Court of the United States for the Southern District of New York.

A. J. Rose, for plaintiffs in error.

Albert Stickney, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The defendant in error, plaintiff in the court below, is the executor of the Countess of Dundonald, who was a subject and resident of Great Britain, and who brought this action to recover rents or royalties under the stipulations of a lease to defendants of certain asphalt properties in the Island of Trinidad. The defendants, at the time of the transaction complained of, were citizens of and residents in the state of New York. The agreement which is the basis of the action is in writing, and all the material dealings between the parties appear from the correspondence. The lease conferred upon the lessees the exclusive right for the term of four years and five months from February 1, 1896, "to dig, work, search

¶ 1. See Landlord and Tenant, vol. 32, Cent. Dig. § 230.

for, and win all pitch and asphalt of good merchantable quality suitable for paving purposes, upon the certain lands of said lessor," subject to a certain rental and royalties and other provisions, including a provision for renewal. The following quotations from the lease show the covenants of the parties material to the questions herein:

"If, on or before the first day of July, 1900, the lessees shall not since the commencement of the lease have won out of the said lands and paid royalty upon the total quantity of thirty four thousand tons of pitch or asphalt at the rate aforesaid, they shall subject to the provisions hereinafter contained on the said first day of July, 1900, pay to the lessor royalty at the rate aforesaid upon such number of tons as shall be the difference between the number of tons upon which royalty shall have been paid and the said number of 34,000 tons. * * *

"The lessees shall not assign or underlet the premises hereby demised or any part thereof without the consent in writing of the lessor. * * *

"The lessor also covenants with the lessees that if at the expiration of the said term the lessee shall have paid the rents hereby reserved and observed and performed the conditions herein contained and on their parts to be observed and performed and shall be desirous of renewing said terms, and shall give to the lessor, her heirs or assigns six months notice in writing, personally or by leaving the same at her, their or any of their usual or last known place of abode in England, then the lessor will grant and the lessee shall take a renewed lease in respect of the said land and premises for a further term of ten years. * * *

"If any dispute or difference shall arise between the lessor or lessees concerning any matter or thing whatever herein contained or the operation or construction thereof or any other matter or thing in any way connected with these presents or the rights, duties and liabilities of either party under or in connection with these presents then, in every such case the dispute or difference shall be determined in a manner to be agreed upon between the parties and in case of their disagreement then by action or suit in Her Majesty's High Court of Justice in England and not elsewhere and this clause may be pleaded against any action or suit or commenced by either party out of England."

In March, 1896, the defendants, with certain other persons, formed a corporation known as the Columbia Construction Company, and in April, 1896, a contract was entered into between said company and these defendants whereby the latter agreed to furnish to the Columbia Company an amount of asphalt equal to the amount to which they were entitled under said lease. The Columbia Company "covenants and agrees to take such asphalt and win and dig all the pitch or asphalt herein referred to and transport the same from the said Island of Trinidad, * * *" and "to pay for the rights, privileges, and asphalt hereby secured the further sum or sums of money required to be paid under said contract with Louisa Harriet Dundonald directly or to the parties of the first part, at the option of said second party." It does not appear that this contract was ever brought to the notice of the Countess Dundonald. In May, 1899, a portion of the defendants executed an assignment of said lease to said Columbia Company.

The record correspondence between the parties is evidently incomplete. In the correspondence between August 21, 1896, and February 21, 1898, the plaintiff, addressing her letters to the defendant Warner, referred to "your company" and "your engineer of Columbia Construction Company"; and Warner, in his replies, referred to "the company" and "our company," and signed all of said letters individually, with one exception. The first payment, on January 1, 1897, was prom-

ised by Warner, signing himself "C. M. Warner, Pres." The payment was made by Columbia Construction Company, "the same being due you on lease * * * between yourself and C. M. Warner et al." One later payment appears to have been made by Warner personally. Payments subsequent thereto were made by the Columbia Company to Lady Dundonald, and accepted by her. In her later letters Lady Dundonald repeatedly used such expressions as "my lease to the Columbia Construction Company," "rent due by Columbia Construction Company," "I have to call on you [the Columbia Construction Company] to carry out your covenants"; and on February 11, 1889, she authorized the company at her expense "to protect or enforce my titles and rights of possession so as to assure your uninterrupted and peaceable working * * * of the lands * * * leased by me to you." All claims and royalties were paid prior to June 30, 1900, except for the difference between amount of asphalt dug and 34,000 tons as specified in said agreement, and for this sum, amounting to \$14,061.79 and costs, the court directed a verdict in favor of plaintiff.

The questions raised by the assignments of error are the following:

- (1) That Lady Dundonald consented to the assignment to the Columbia Company.
- (2) That she broke the covenant to renew the lease.
- (3) That the agreement that any dispute or difference under the lease should be determined by "Her Majesty's High Court of Justice in England" is a bar to this action.

A critical examination of the correspondence establishes the consent of Lady Dundonald to the assignment of the lease. In fact, her course is inconsistent with any other conclusion. In addition to the repeated recognition of the Columbia Company as her lessees, and her continued receipt of rents from it, the following statements made by her establish her waiver of her right to object to said assignment:

(1) In her letter of May 24, 1900, attempting to take advantage of said assignment, she refers to her letter of February 11, 1899, in which, as she says, she wrote to the Columbia Company, her lessees, and authorized them to take legal proceedings on her behalf to insure their uninterrupted occupation at her cost, and says, "This letter [of February 11th] was clearly revocable by me, and it has now been revoked." Having thus admitted that she had recognized the Columbia Company as her lessees, and as entitled to enforce her rights as above, she fails to revoke the recognition in said letter until May 2d, or nearly six months after the Columbia Company had given her notice of its desire to exercise its option for renewal of the lease.

(2) On January 15, 1899, Lady Dundonald, having received notice of a change in the personnel of the stockholders of the Columbia Company, replies thereto by referring to the provision against an assignment in the lease, and saying that, before she could give her consent to any substantial change in the composition of the company, she should require to be informed of the names of those who now control it, and requested references as to their commercial standing and ability to carry out their agreements. Thus having asserted her right to object to the assignment, she merely requests the Columbia Company to obviate said objection by giving her satisfactory references as to the solvency of the new management, and impliedly says: "I

have no objection to the Columbia Company as my lessees by virtue of said assignment, but before I consent to said change in the management I wish certain information." This information was furnished. Lady Dundonald thereafter renewed her dealings with the Columbia Company, and failed to further suggest or assert any right to insist upon said provision against assignment until after the Columbia Company had notified her of their option to renew the lease.

(3) Prior to her final letter, which was written in the latter part of June, but subsequent to the notice of exercise of option to renew by the Columbia Company, Lady Dundonald, having reached the conclusion that the rent to be paid by the lessees was much less than it should have been, states that she regards herself as free to make such new arrangement as she deems proper, and contents herself with mere notices of intention to exercise her right not to renew, and a refusal to admit the right of the Columbia Company to make a claim for a renewal in its favor. But in said final letter she definitely repudiates said agreement, and states that she shall take legal steps to recover possession of the property.

Where a lease contains a provision that the lessee shall not sublet or assign without the written consent of the lessor, if the leased property be turned over to another without the original consent of the lessor, and the lessor acquiesces therein, and fails to seasonably object thereto, the breach of the agreement will be considered as waived by him. *The Elevator Cases* (C. C.) 17 Fed. 200, 3 McCrary, 463. In these circumstances, the declarations of Lady Dundonald not only conclusively establish her consent to said assignment, but, in view of the fact that she postponed making any objection thereto until after the time when the defendants, if they had been notified of that option, might have made the tender instead of the Columbia Company, we think the plaintiff is now estopped to take advantage of the wrong of his testatrix, and to deny the truth of her representations, by reason whereof the lessees, assuming her consent to the assignment, were induced to assume a position prejudicial to their interests. The assignment being valid as against the lessor, the demand for renewal was properly made by the assignee, to whom the covenant to renew passed by the assignment. *Parsons on Contracts* (8th Ed.) vol. 1, p. 243; 18 *American & English Encyc. of Law* (2d Ed.) 786. It follows that the refusal to renew, after seasonable notice, was wrongful.

The second assignment of error is based upon the claim that Lady Dundonald, by such refusal, disintitiled herself to sue upon the written contract for recovery of the stipulated amount of differential rent. Defendants had bound themselves to pay said difference on July 1, 1900, subject to the provisions of said lease, including said agreement for renewal. Lady Dundonald had bound herself to grant said renewal on July 1, 1900, provided defendants should have paid the rent and observed the conditions of said lease. It seems clear, in view of her express covenant agreeing to renew upon payment and notice, that she could not have required payment of said difference after such notice, except upon a grant of said renewal. The effect of due notice to renew was to make the covenant to pay the stipulated rent and the covenant to renew mutual covenants, and the right of the plaintiff's

testatrix to recover the stipulated sum without performing or offering to perform her covenant to renew would, technically speaking, depend upon the order in which the covenants were to be performed. *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822. It is unnecessary to determine whether or not these covenants, after such notice, can be treated as independent, because we are satisfied, as already stated, that, if the lessor had any right to require payment before renewal, she has waived the order of performance of the covenants by her own anticipatory breach. "Where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages, and, if the latter elects to treat the contract as terminated, his right of action accrues at once." *Marks v. Van Eeghen*, 85 Fed. 853, 30 C. C. A. 208; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *In re Stern*, 116 Fed. 604, 54 C. C. A. 60.

Even if it be assumed, as claimed by plaintiff, that the contract rights and obligations of the lessor and the original lessees were unchanged by the assignment of the lease to the Columbia Construction Company, yet, after said notice given, we cannot construe the contract as requiring the defendants, on the 1st day of July, 1900, to pay the lessor said difference, not due until that day, in the face of her prior unconditional notification, then in force, that she would refuse to grant the renewal. It may fairly be assumed, in view of the disproportionately large amount to be paid on July 1, 1900, as compared with previous years, that said agreed differential payment was in large measure the consideration for said agreed renewal. The lessor's refusal being wrongful, the lessees were at liberty, on July 1, 1900, either to tender said differential rent and insist on specific performance of the covenant for renewal, or to refuse payment and treat the contract as at an end so far as it remained executory. They have taken the latter course. The lessor, having wrongfully refused to renew, her executor is in no position to demand the performance of the agreement. If the plaintiff has any cause of action against these lessees, it must be supported on a quantum valebat. It cannot be maintained on the theory that he is entitled to a strict performance of the agreement.

In view of these conclusions, it is unnecessary to discuss the third assignment of error.

The judgment is reversed.

(128 Fed. 570.)

NETHERLANDS-AMERICAN STEAM NAV. CO. v. DIAMOND.

(Circuit Court of Appeals, Second Circuit. March 2, 1904.)

No. 91.

1. SHIPPING—SERVANTS—INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action against the owner of a vessel for injuries to a servant of an elevator company, caused by his falling into the hold, as the result of the insufficiency of light, after the vessel's hatches had been closed, evidence held to authorize the submission of the question of defendant's negligence and plaintiff's contributory negligence to the jury.

2. SAME—ASSIGNMENTS OF ERROR—EXCEPTIONS—NECESSITY.

An assignment of error not supported by an exception cannot be reviewed.

3. SAME—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where plaintiff was directed to go into the hold of a vessel, in order to trim grain, which had been loaded therein, and the vessel's servants, with knowledge that plaintiff had gone into the hold, and needed the light which came from the open hatches, and after being requested not to close the same, did so, without answering such request, and plaintiff was thereafter precipitated into the hold, by stepping on a misplaced bin cover, while groping his way in the dark with his shovel in front of him, requested instructions which ignored such evidence, tending to show that defendant had negligently placed plaintiff in a position of peril, and which assumed that what plaintiff did constituted contributory negligence as a matter of law, were properly refused.

4. SAME—PARTICULAR ACTS.

Where, in an action for injuries to a servant of an elevator company by falling into the hold of a vessel, the court sufficiently stated the rule to be applied by the jury in determining whether or not plaintiff had been guilty of contributory negligence, the court was not bound to give requested instructions directing the jury's attention to plaintiff's particular acts bearing on such question.

5. SAME—MODIFICATIONS.

Where a servant of an elevator company was injured by falling into the hold of a vessel, alleged to have resulted from the negligent shutting off of the light from the hatches by the seamen, a requested instruction that defendant was entitled to close its hatches in the rain, and was not at fault for having no light in the tank or on the orlop deck, and was not bound to furnish electric light for the elevator company's men, was properly modified by adding that such right to shut off the light was to be considered with reference to defendant's relation to plaintiff while using the hatch light as bearing on the question of defendant's negligence.

6. SAME—FELLOW SERVANT.

Where the superintendent of an elevator, who had charge of the loading of a vessel, testified that he had no control over the vessel's men, and denied that he gave any directions or requested the hatches to be closed, and only a single witness testified that the superintendent wanted to cover up the hatches on account of the rain, and that witness ordered it to be done, but did not testify that the superintendent ordered the hatch covered so as to exclude the light, which could have been prevented, it was not error for the court, in an action for injuries to a servant of the elevator company caused by the shutting off of the light by the closing of the hatches, to refuse to charge that, if the jury believed that the seamen

¶ 6. Who are fellow servants, see note to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Canadian Pac. Ry. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

covered the hatch by direction of the elevator superintendent, plaintiff could not recover on the ground that, if the act in so doing was negligent, it was the negligence of plaintiff's fellow servant.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here on writ of error from a judgment in favor of plaintiff for \$3,000 damages, rendered on a verdict of a jury in an action tried in the United States Circuit Court for the Eastern District of New York.

Henry G. Ward, for plaintiff in error.

James C. Cropsey, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Prior to the accident in question the plaintiff in the court below, a servant of the International Elevator Company, had been engaged on a canal boat shoveling grain, which was to be transferred to defendant's steamship. He was directed to go into the port bin of the ship's hold in order to trim the grain. There were two of these bins, a starboard and a port bin, located under the orlop deck. The upper, between, and orlop decks were reached by a series of ladders located at the starboard forward corner of the hatchway known as No. 3. Ladders also led down from the orlop deck into each of said bins through the openings therein. The size of these openings was about 7 by 9 feet.

When plaintiff approached hatchway No. 3 to descend into the hold it was raining slightly, and defendant's servants had begun to put on the covers of the hatchway, but four sections of said hatch covers, at the forward end where the ladder was located, had not been put on. When the hatches were off there was light enough to enable the men to pass up and down the ladders in the course of their work. On the deck alongside said hatchway were lanterns for the use of the men when necessary.

The light was sufficient for plaintiff's requirements when he started down the ladder, followed by one McGoldrick. He noticed, however, that defendant's servants were putting on the hatches, and he heard McGoldrick ask them whether they wanted to kill the men. When he reached the orlop deck there was barely light enough to enable him to see his way across to the wing on the port side, where, in accordance with a prevailing custom, he was to leave his shirt. As he was pulling it over his head the last of the light had disappeared. He started to find one of the ladders, feeling his way by pushing his shovel in front of him. While so doing he stepped on the bin cover, which was projecting over the edge of the bin opening, the cover tipped down, and he fell into the hold, sustaining serious injuries.

The exceptions challenge the propriety of the refusal of the court to direct a verdict for defendant, on the ground that the evidence failed to show negligence on the part of the defendant, and conclusively established contributory negligence on the part of the plaintiff.

The sole negligence complained of consisted in the act of closing the hatchway while plaintiff was descending the ladder. The evidence was uncontradicted that repeated requests were made to the ship's men not to put on the hatch covers at that time, as the light was needed below. On this point the court charged the jury, *inter alia*, as follows:

"The ship was under no obligations whatever primarily to furnish a light to the elevator's men, and under no primary obligations to furnish a light to this plaintiff, but the plaintiff's own master was bound to furnish him with artificial light. The plaintiff had a right, however, to use the light passing through the hatch while it was shining there. And while the ship had a perfect right to cover up the hatch when the rain came on, it had no right to close up the hatch provided the persons in charge knew, or had reason to know, that the plaintiff was relying upon the light to make his way down into the ship.
* * *

"If the ship wanted to close up the hatch, it was the duty of its servants to use reasonable care to do it in such a way that the plaintiff would not be injured, provided the plaintiff in good faith was relying upon that light to go down.
* * *

"Of course, if, when Diamond came to this place, these men said to him, 'This light is going to be shut off, we are going to close this right up,' and they said this by word or action, so that he had full and fair and reasonable notice of it, and he went down, then he took his own chances. But if he went down using the hatch as other men were entitled to use it when it was not covered, and the men were asked to leave off some of the covers, and if he had a right to believe that they would leave them off until he had a fair chance, a reasonable chance, to get into the lower hold, then, if they didn't use due care, ordinary care, in withholding the hatches until he had a fair chance to get down into the hold, the defendant is guilty of negligence, and it is for you to say whether the plaintiff did or did not have this notice. If he did not have it, it is for you to say whether the defendant did exercise the proper care to give him a fair chance in the amount of light delivered and for a sufficient time to allow him to get down there.
* * *

"You will take into consideration, in determining the question of the defendant's negligence in closing up the hatch, what a man of ordinary prudence would expect the plaintiff would be confronted with as he went down. For instance, it is alleged here that this cover was off the hatch on the orlop deck. It was not negligence to lift that cover off the hatch. It is alleged that the cover projected over the hatch. It was not negligence on the part of the defendant to allow the cover to project over the hatch. But, if it was projecting over the hatch, then you are to consider, as bearing on the question of the defendant's negligence, whether a man of ordinary prudence, stationed there and having this plaintiff in charge, would not have thought, 'If I close up this light the plaintiff must go down so many ladders, he must make such arrangements as he is entitled to go down into the lower hold, and there is the hatch cover resting over the hatch opening, and he may tumble over that, be precipitated over that, and carried down into the lower hold.' That question of the hatch cover is merely an incident here; it is not the main question to be decided, but it is an incident which a man of ordinary prudence would take into consideration in determining the danger of closing up the hatches before the plaintiff could reach his destination."

These excerpts from the charge show the theory on which the court rightly submitted the single question involved as to defendant's negligence to the jury. The argument of defendant's counsel is that plaintiff knew, or had reason to know, that the hatches were to be put on immediately, because the men continued to put them on after plaintiff started to descend; that plaintiff, therefore, assumed the risk; and that what he afterward did, and not the closing of the hatchway, was the proximate cause of the injury. But the uncon-

tradicted evidence of plaintiff and of his companion, McGoldrick, is to the effect that when they asked the men not to cover up the hatches until they got down the men made no reply. The plaintiff had, at least, quite as much right to assume that defendant's servants would leave off hatches sufficient to furnish him light as to suppose that they would put him in a position of peril by shutting off all light, especially when no necessity was shown for their doing so. In these circumstances, the court in its charge having fully discussed the relevant evidence, accurately stated the respective rights and obligations of the parties, and properly left to the jury the question whether the defendant acted with a reasonable regard to said rights and obligations.

Defendant's exception to the refusal of the court to direct a verdict in its favor on the ground of plaintiff's contributory negligence is based on two grounds. Defendant's counsel argues that even if it be assumed that plaintiff, being confronted with a sudden emergency, acted properly in attempting to grope his way to the bin opening, the position was one of his own choosing, because he had elected, after timely warning from the impending hatch cover, not to go back and get a light, or that, if he was not in a position of emergency, he was grossly negligent in not guiding himself back to the ladder by the bulkhead, along which he had just come, or in not waiting for McGoldrick to come down.

The first contention was properly left to the jury, under appropriate instructions, as appears by the portion of the charge quoted above and by other portions not quoted. The other contention overlooks the fact that the jury must have reached the conclusion that plaintiff was placed in a perilous position through the negligence of defendant, or otherwise they would have rendered a verdict in favor of defendant. Defendant's negligence having been thus affirmatively found in this regard, the rule of law must be applied that one who, by his negligence, places another in a position of peril, cannot relieve himself from liability by showing that the other committed an error of judgment.

It is by no means clear that plaintiff was guilty of negligence in proceeding slowly, pushing his shovel in front of him, along the deck toward the bin where he had been ordered to go. There would have been no danger in this course if the cover had not projected over the opening in the bin, a condition which the plaintiff could not be presumed to anticipate.

In any event, questions of proximate cause and reasonable care, especially in cases involving the claim of contributory negligence, are peculiarly for the jury, to be determined under proper instructions from the court, according to the circumstances of the particular case. *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 558, 11 Sup. Ct. 653, 35 L. Ed. 270; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Baltimore & Ohio Railroad Co. v. Griffith*, 159 U. S. 603, 611, 16 Sup. Ct. 105, 40 L. Ed. 274.

The twelfth assignment of error is directed to a portion of the charge quoted above, and furnishes no ground of exception when read in connection with the rest of the charge.

There is no exception to support the thirteenth assignment of error.

Error is further assigned to the refusal of the court to charge, as requested by defendant, as follows:

"First. If the jury believe the plaintiff could have obtained a lantern if he had asked for it, and yet moved about on the orlop deck in the dark, he cannot recover in this case because there was no light or insufficient light there.

"Second. If the plaintiff knew the general disposition of the orlop deck when he fell, he assumed the risk of moving about on it in the dark.

"Third. If the plaintiff did not know the general disposition of the orlop deck when he fell, then it was contributory negligence on his part to move about on it in the dark.

"Seventh. If the plaintiff, with knowledge that the upper hatch was covered and that there was no light, or insufficient light, on the orlop deck, undertook to find and descend into the deep tank, he cannot complain of this condition of things."

These requests ignore the evidence tending to show that defendant had negligently placed plaintiff in a position of peril, and assume that what plaintiff did in the dark necessarily constituted such contributory negligence as would preclude recovery. The plaintiff's testimony as to what occurred is as follows:

"I looked around, and I didn't know what to do, I didn't know how long I would be there. I got my shovel out in front of me, and started over for the ladder, either to go up and get a light or to go down in the hold. I started on, feeling my way the best way I could, and in as safe way as I could, and I went in the hold. * * * I was walking slowly with my shovel in front of me, going on trying to find my way as best I could, until I got struck and fell right into the hold."

Even if the jury had found that defendant was not negligent, it was for them to determine whether a man of ordinary prudence, not knowing or having reason to assume that a cover was sticking out over the opening in the bin, would have acted as plaintiff did, in view of all the circumstances. In any event, as the charge of the court on this point sufficiently stated the rule to be applied, the court was not bound, by directing the attention of the jury to particular acts, to divert their minds from the view of the whole situation in the light of all the surrounding circumstances. *Erie Railroad Company v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Pennsylvania Railroad Co. v. Palmer*, 127 Fed. 956, 62 C. C. A. 588.

At the close of the general charge the court further charged the defendant's fourth, sixth, and ninth requests, to the effect that defendant had the right to close its hatches in the rain, and was not at fault for having no light in the tank or on the orlop deck, and was not bound to furnish electric light for the elevatormen, but added that said rights to shut off the light were to be considered with reference to its relation to the plaintiff, while using the hatchway light, as bearing upon the question of defendant's negligence, under the rules previously stated in its charge. The defendant excepted to said modification. That said modification was properly made appears

from the foregoing discussion. The exceptions to said modification must therefore be overruled.

Exception was also taken to the refusal of the court to charge defendant's eighth request, which was as follows: "If the jury believe that the defendant's servants covered the hatch by the direction or at the request of the superintendent of the elevator, then the plaintiff cannot complain of its doing so, even if it were negligent, because it would be the negligence of a fellow servant." The superintendent stated that he had no control over the ship's men, and denied that he gave any such direction or request. The single witness who testified as to any such directions stated that the superintendent wanted to cover up the hatch on account of the grain, and that he, the stevedore, ordered it to be done. But he does not state that the superintendent ordered the hatch so covered as to exclude the light—there was another way of covering the hatches with a tarpaulin, which was often employed, and which permitted the light to shine through—and it does not appear that the defendant's servants, in thus shutting out the light while plaintiff was descending, acted under his supervision or directions. The exception is overruled.

The judgment is affirmed.

(128 Fed. 575.)

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In re THOMPSON.

In re MURRAY.

(Circuit Court of Appeals, Second Circuit. February 1, 1904.)

No. 60.

1. BANKRUPTCY—JURISDICTION OF COURT—PROCEEDING AGAINST ASSIGNEE.

A court of bankruptcy has jurisdiction to require an accounting from an assignee for creditors of a bankrupt, under an assignment which constituted an act of bankruptcy; and where he appears and submits his account, and enters upon a hearing without objection, the court does not lose jurisdiction to require him to turn over the property to the trustee because he asserts title to a part of such property in himself.

2. SAME—CHATTEL MORTGAGE—EXTINGUISHMENT OF LIEN.

Where a chattel mortgagee of a bankrupt, prior to his bankruptcy, but after he had made a general assignment, accepted a part of the mortgaged property in full satisfaction of his debt, his lien on the remainder is extinguished, and he cannot thereafter transfer it to one of the other creditors to the exclusion of others.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

For opinion below, see 122 Fed. 174.

This is a petition by Herman R. Murray, individually and as assignee of William Thompson, the bankrupt above named, for a review of an order made herein by the District Court of the United States for the Southern District of New York, on the 27th day of March, 1903, modifying an order made herein by the referee in bankruptcy, dated February 20, 1903, affirming said order, as modified, and directing the petitioner to pay over to Isaac C. Wilson, trustee, the sum of \$5,756.60, being the value of certain personal property alleged to have been wrongfully appropriated by the petitioner, as assignee in state insolvency proceedings of said William Thompson, bankrupt. The bankrupt,

a livery stable keeper in New York City, made a general assignment for the benefit of creditors to Herman R. Murray on November 27, 1900. On December 4, 1900, a petition in involuntary bankruptcy was filed against him. On December 26, 1900, an adjudication was made, and on February 26, 1901, Isaac C. Wilson was elected trustee. On March 4, 1901, the trustee procured an order from the district judge requiring that Murray forthwith deliver to the trustee all books, papers and documents in his possession relating to the estate, and that he present to the court an account of all moneys and properties received by him belonging to the bankrupt and thereupon deliver and pay over to the trustee such properties and moneys as the court should direct. Upon the return of the order the district judge referred the matter to the referee in charge and thereafter the parties appeared before the referee and Murray presented an account of receipts from book accounts and of disbursements. Proceedings were thereupon continued from time to time and resulted in the order as stated above.

At the date of the assignment there were upon the bankrupt's property certain chattel mortgages as follows:—

First:—A mortgage to Fiss, Doerr and Carroll on which there was due \$400.

Second:—A mortgage to Hincks & Johnson, dated January 21, 1899, covering substantially all the property the bankrupt then had in the business, to secure the sum of \$46,757, there being due thereon at the date of the assignment about the sum of \$29,150.

Third:—A mortgage dated January 21, 1899, to Herman R. Murray to secure the sum of \$4,625 covering 21 horses, 20 sets of harness and a motor car.

Murray was permitted to hold all the property covered by his own mortgage and the Fiss, Doerr and Carroll mortgage which he had purchased, but was not permitted to hold the property covered by the Hincks & Johnson mortgage, which was not taken by that firm.

Murray voluntarily appeared on the accounting and submitted to the jurisdiction of the court. The accounting proceeded to the end without objection. It is stated in the decision of the referee that the question of jurisdiction was raised on the argument, but it does not elsewhere appear in the record that the objection was taken at the hearing before the referee. The authority of the referee to make the order was challenged at the hearing before the district judge, but as the latter adopted the findings of the referee and entered an independent court order the authority of the referee to make the order is no longer in issue. His order was merged in and superseded by the subsequent order of the court.

In the petition to this court for review the objection is asserted for the first time that the District Court, sitting as a court of bankruptcy, was without jurisdiction to enter the order in question.

Other facts appear in the carefully prepared decision of the referee.

William J. Fanning, for petitioner.

Edward H. Wilson, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. It is manifest that the court had jurisdiction to compel the assignee under the void state assignment to render an account. *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. This proposition is not disputed. The petitioner, Murray, recognizing the authority of the court, appeared voluntarily before the referee, presented his account and gave testimony regarding it. Having once acquired jurisdiction of the proceeding the court did not lose it because the investigation took a wider range than the assignee expected or intended. His present contention, carried to its logical conclusion, is that the court acquired jurisdiction of those items which he chose to admit, but not of those which he chose to dispute, and that this jurisdiction was lost the moment he

asserted a claim of title in his individual capacity. If this contention were sustained an assignee for the benefit of creditors could, by the mere assertion of a colorable claim, paralyze the arm of the court of bankruptcy and defeat the intent and purpose of the law. It is asserted by the counsel for the trustee that since the amendments of 1903 the District Court has jurisdiction of any action or proceeding which the trustee may hereafter institute if the petitioner's present contention be upheld, and that a reversal of the order, while subjecting the parties to the expense and delay of retaking the testimony, will be absolutely inconsequential for the reason that the same result must inevitably be reached in the new proceeding. Whether this contention be well founded or not we do not decide, but the possibility that it may be furnishes an additional reason why a decision reached after such careful consideration should not be overthrown. The petitioner was accorded the fullest opportunity to establish his defense, every fact bearing upon the controversy is now before the court and even though the question were involved in greater doubt than it is it would seem to be the duty of the court to resolve it in favor of jurisdiction.

Upon the merits we are of the opinion that the conclusions of the referee, adopted and affirmed by the district judge, are correct. The assignment under the state law was itself an act of bankruptcy and was void. Murray got no title superior to the title of the trustee by virtue of such assignment. His right to hold the fund in controversy is founded solely upon an alleged gift, or transfer to him by the firm of Hincks & Johnson as mortgagees. Murray was a member of this firm, but the firm saw fit, acting through its senior partner, who had authority to bind the copartnership, to accept part of the mortgaged property in full satisfaction of the debt. After the assignment Hincks & Johnson took, under their mortgage, between 50 and 60 carriages and they were sent by the assignee to the factory of the firm at Bridgeport, Conn. The firm waived all claim to the other property, horses, harness, etc., covered by the mortgage. Of this there can be no doubt. Mr. Hincks testified:

"I do not know what became of the property other than the carriages. We had nothing to do with it at all. I told Mr. Murray that I didn't care to bother with horses or property of that kind, and the assignee took it. The firm of Hincks & Johnson made no claim to 119 horses that were covered by this chattel mortgage. We had nothing to do with the horses or other property, except the carriages. I don't know what became of those horses. I suppose they were sold by the assignee. We waive all claim to all of that property. We never claimed to take that property, we never had any property except the carriages at any time. With reference to the horses and all the other property that appears in the mortgage we waive all claim, they haven't come into our possession at all, and we don't assert any claim and we never shall. Don't understand me as waiving any rights of Mr. Murray. I am speaking now for myself and Mr. Johnson. I don't know that I ought to speak for Mr. Murray; but as an entity the firm of Hincks & Johnson, those don't enter into his assets at all. They are waived by that firm."

Subsequently Mr. Hincks was recalled and attempted to explain this positive testimony of an unqualified release, reiterated again and again, by the assertion that he meant to testify that he told Murray "that if he would turn over the carriages to us without expense that

he was welcome to whatever rights we had in the miscellaneous property, horses, carriages, etc. That he might apply that property towards satisfying any deficiency on his mortgage." The District Court was at liberty to reject this explanation as an afterthought and as incompatible with the previous testimony of the witness, but assuming it to be true it does not justify the course of the petitioner in applying the property in payment of his individual mortgage. Hincks & Johnson, the mortgagees, made no claim to the mortgaged property other than the carriages. These they accepted in full satisfaction of their claim. In legal contemplation it was as if they had received a sum of money in full payment of the mortgage. When their mortgage was satisfied the property covered by it ceased to be theirs or under their control. It did not pass to other mortgagees, whose mortgages did not include it, but to the assignee to be divided among the creditors and, in case of bankruptcy, to the trustee. Hincks & Johnson might have had the property sold and the proceeds applied on their debt; they might even have transferred it to Murray, as a member of the firm, to dispose of for their benefit, but this they did not do. After the firm debt was extinguished they attempted to exercise dominion and control over the property and transfer it to one of the bankrupt's creditors to the exclusion of all the rest. Hincks & Johnson unquestionably had the right to make their debt good out of the mortgage property, but when this had been done the firm's interest ceased and the property under the provisions of the bankruptcy act, passed to the trustee for the benefit of all the creditors.

The order is affirmed with costs.

(128 Fed. 882.)

ROBERTS v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1904.)

No. 984.

1. LIENS—CLAIM AGAINST RAILROAD COMPANY—PRIORITY OF MORTGAGE.

An order, given by a railroad company, directing its treasurer to pay the holder a sum "out of the proceeds of the sale of the first bonds sold of this company," does not create a lien on the property of the company, afterwards sold and transferred before the issuance of any bonds to a second company, which assumed payment of the debt, so as to take precedence of a mortgage executed by the purchasing company to secure an issue of bonds, but the claim of the holder is subordinate to the lien of such mortgage.

Appeal from the Circuit Court of the United States for the Northern District of California.

For opinion below, see 110 Fed 70.

This is a suit brought by the Central Trust Company of New York against the California & Nevada Railroad Company and others, to foreclose a mortgage made by said railroad company to secure an issue of bonds. Mary E. Roberts, appellant herein, was named as a party defendant having or claiming

to have some interest in the property. The claim of Mrs. Roberts is evidenced by a written instrument, draft, or order, which reads as follows:

"No. 64.

San Francisco, September 10, 1881.

"\$5,000. To C. F. Burrell, Treasurer California & Nevada Railroad Co.: Pay to John T. Davis, or order, five thousand dollars (\$5,000), payable out of the proceeds of the sale of the first bonds sold of this company.

"D. M. Walker, President.

"E. A. Phelps, Secretary.

"Accepted to be paid as herein specified.

"C. F. Burrell, Treasurer."

Indorsed: "Pay to the order of Mrs. Mary E. Roberts.

"John T. Davis."

On the day this loan was made, a resolution was passed by the board of directors authorizing the execution of this writing, which resolution was duly recorded in the minute book of the corporation. The cause was referred to a master, and the facts relative to her claim were reported by the master as follows:

"A corporation, known as 'The California & Nevada Railroad Company,' was organized under the laws of the state of California, on the 25th day of March, 1881, for the purpose of constructing and operating a railroad from the city of Oakland, Cal., to the state line between the state of California and the state of Nevada, at or near the town of Bodie, Cal., a distance of about 250 miles. Said railroad company got rights of way, graded some 12 miles of road, and laid 5 miles of rails. On the 10th day of September, 1881, Mary E. Roberts loaned or advanced to said railroad company the sum of \$5,000, upon the representation of John T. Davis, one of the promoters and president of said company, that the money was needed to push the working of the road, and received therefor a demand upon the treasurer of said company for the sum of \$5,000, 'payable out of the proceeds of the sale of the first bonds sold of this company.' Thereafter, on the 25th day of March, 1884, a new corporation was organized, called the 'California & Nevada Railroad Company.' The new corporation was composed of nearly the same persons as the first company, and was organized for the same purposes. The first corporation, on the 25th day of March, 1884, sold and transferred to the second company its entire road and properties. As a part of the consideration of the transfer, the second company agreed to assume all the outstanding obligations of the first company. Thereafter, on the 10th day of April, 1884, the second company, having acquired possession of all the property of the first company as aforesaid, executed a mortgage or deed of trust to the Central Trust Company of New York, the complainant in this action, which mortgage covered all the property then owned or which might thereafter be acquired by said company. Said mortgage was given to secure the payment of 5,000 bonds, to be issued by said railroad company, of the denomination of \$1,000 each, payable in 30 years, with interest at the rate of 6 per cent. per annum, payable semiannually, 'to pay for the construction, equipment, and completion of the railroad.' In pursuance of said deed of trust or mortgage, 545 of the bonds were issued by said railroad company. The railroad company having made default in the payment on said bonds, this action was brought by the trustee to foreclose the mortgage. On the 3d day of June, 1886, an action was commenced in the superior court of the city and county of San Francisco, by Mary E. Roberts, upon the written instrument aforesaid, to recover the sum of \$5,000 and interest. A writ of attachment was issued and levied upon the whole property of said railroad company. Said attachment has not been discharged, and said action is still pending. The defendant Mary E. Roberts in her answer prays that it may be adjudged that the defendant railroad company is indebted to her in the sum of \$5,000, with interest, and that the lien acquired by her under the writ of attachment aforesaid is a prior lien upon the properties of the said railroad company to any and all bonds issued after June 3, 1886, the date of the levy of the attachment aforesaid."

The final decree in the court below is adverse to Mrs. Roberts' contention. Hence this appeal.

John A. Wright, for appellant.

Platt & Bayne (Galpin & Bolton, of counsel), for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The contention of appellant is that the claim of Mrs. Roberts constitutes an equitable lien upon the property mortgaged, and takes priority in marshaling the assets over all the bondholders, because before the mortgage was given she had an assignment of the "proceeds of the first bonds sold of this company"; and she claims that the Central Trust Company took the mortgage with notice of this equitable assignment to her, and that when the first bonds were sold the proceeds must be regarded in equity as a fund having impressed on it a lien in the nature of a trust by virtue of the equitable assignment held by her. It is not claimed that any bonds were issued prior to the execution of the mortgage herein sought to be foreclosed. The mortgage was given to secure the issuance of bonds. There never was any sale of bonds for money. There were no cash subscriptions for the bonds. They were all issued to contractors for construction or repair work, or for salaries and professional services. There were 545 bonds issued, but of that number only 345 bonds were found by the master to have been legally issued. Under the facts of this case it became necessary to execute the mortgage in order to secure the issue of the bonds. When the new corporation was organized, it assumed all the outstanding obligations of the old corporation, and undoubtedly the new corporation is liable, in a proper proceeding, for the payment of that debt. But the sole question here is whether Mrs. Roberts is entitled to a prior lien upon the proceeds of the foreclosure sale, to wit, upon the railroad.

It is conceded by both parties that her rights in the premises must be determined by the strict terms of the order or draft. This document was an acknowledgment of the sum of money received from her "to push the working of the road," and an agreement that the demand should be payable out of the proceeds of the sale of the first bonds sold of this company. It did not of itself create a lien upon the property of the corporation. It did not constitute an agreement by the company to set apart any specific earnings or property in the hands of a third person to meet the interest or principal due upon Mrs. Roberts' claim. And herein it differs from the principles announced in *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999, and other cases cited by appellant. It was a mere personal promise on the part of the railroad company that it would pay the claim in a certain way out of a fund which never came into existence. The attachment suit was not brought until after the lien of the mortgage attached. The demand of Mrs. Roberts is a meritorious one, but it is subordinate to the lien secured by the mortgage.

In *Fogg v. Blair*, 133 U. S. 534, 540, 10 Sup. Ct. 338, 340, 33 L. Ed. 721, it was held that a liquidated claim against a railroad company, not converted into judgment, which another railroad company, pur-

chasing its road and property, agrees with the selling company to assume and pay as part of the consideration, does not thereby become a lien upon the property, so as to take priority over the lien of a mortgage made by the purchasing company to secure an issue of bonds. Mr. Justice Field, in delivering the opinion of the court, among other things, said:

"The property of a railroad company is not held under any such trust to apply it to the payment of its debts as to restrict its use for any other lawful purpose, it matters not how meritorious the demand of the creditor may be. He must obtain a lien upon the property of the company, or security in some other form, or he will have to take his chances with all other creditors to obtain payment in the ordinary course of legal proceedings for the collection of debts. * * * There is no evidence in the record before us that the parties who took the bonds issued by the St. Louis, Hannibal & Keokuk Railroad Company had any notice, actual or constructive, of the demand of the complainant. But, if they had, it would not have affected their rights. That demand was not then reduced to judgment, and created no lien upon the property of the company, nor any restriction upon the company's right to use it for any lawful purpose. The bonds were given to raise the necessary funds to complete the road of the company, and the mortgage was executed to secure their payment. They were negotiable instruments, and in the hands of the purchasers cannot be impeached for any neglect of the company issuing them to pay the demands of other creditors. We are unable to perceive any ground upon which their priority over the claim of the appellant can be in any way impaired. We do not question the general doctrine, invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In *Cushing v. Chapman* (C. C.) 115 Fed. 237, it was claimed by the complainant that under the averments of his bill *Newton & Co.*, by a certain contract, "obtained an equitable estate or title to 47 of said bonds to be first thereafter issued, and as soon as issued the railway company held them in trust for *Newton & Co.*" The bill discloses that the 47 bonds were to be a part of a total issue of \$1,550,000 of equal dignity, secured by a first mortgage on the railway's property as the full limit of such issue. This contention of the complainant depended upon the terms of a written contract between the railway and said *Newton & Co.*, which reads as follows:

"In consideration of said sale and assignment [that is, the assignment of a certain judgment *Newton & Co.* held against the Tennessee Railroad Company, and assumed by the Tennessee Railway], the party of the second part [the Tennessee Railway] agrees to transfer and deliver to the parties of the first part [*Newton & Co.*] its first mortgage bonds, to be hereafter issued in the construction of its railway, to the amount of said decree, one dollar of bonds, at their face value, for each dollar of the amount of said decree. The delivery of said bonds to be made as soon as practicable, and as early as any issue of bonds are delivered to any one else in the work of constructing said railway."

Judge Philips, in his opinion, said:

"In its fullest import and broadest construction, this is an executory contract or agreement to thereafter deliver to *Newton & Co.* 47 of the first mortgage bonds to be thereafter issued by the railway 'in the construction of its

railway,' and 'to be made as soon as practicable, and as early as any issue of bonds are delivered to any one else in the work of constructing said railway.' I understand the law to be that a mere promise, however clear or solemn in character, to pay a debt out of a particular fund, does not operate as an equitable assignment of the fund, and especially so when it is a part of a mass of property to be thereafter created. To constitute such an equitable assignment, there must be such an actual or constructive appropriation of the fund or subject-matter 'as to confer a complete and present right on the party meant to be provided for, although the circumstances do not admit of its immediate existence'; that, if the holder of the fund could retain control over it, with the power, *sua sponte*, on his part, to satisfy the promise in cash, it is fatal to an equitable assignment."

And he cited numerous authorities to sustain his position. See, also, *National Bank v. Allen*, 90 Fed. 545, 551, 33 C. C. A. 169; *Coler v. Allen*, 114 Fed. 609, 611, 52 C. C. A. 389; *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371, 384, 14 Sup. Ct. 127, 37 L. Ed. 1113; *Silent Friend Mining Co. v. Abbott* (Colo. App.) 42 Pac. 318.

The decree of the Circuit Court in relation to appellant's claim was correct, and is affirmed.

(128 Fed. 672.)

UNION SELLING CO. v. JONES.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1904.)

No. 1,840.

1. WRITTEN CONTRACTS—PAROL EVIDENCE.

Where a contract has been reduced to writing, and imports on its face to be a complete expression of the whole agreement, it will be presumed that the parties have introduced into it every material item and term; and hence parol evidence is inadmissible to add another term to the agreement, though the writing contains nothing on the particular point to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks; and the legal import can no more be varied by parol than can what is written.

2. SAME—SURROUNDING CIRCUMSTANCES.

Though proof of the surrounding circumstances may be introduced to aid a proper construction of uncertain or ambiguous terms in a written contract, such surrounding circumstances do not include prior representations, proposals, and negotiations of a promissory character, leading up to and superseded by the written agreement.

3. SAME—SALES—WARRANTIES—CONSTRUCTION.

Where a contract for the sale of binder twine contained the words "Quality guaranteed," such words were not uncertain or ambiguous, but should be construed to import a warranty that the twine was reasonably fit for the use for which binder twine is designed, and should be salable or marketable under that description, and hence parol evidence was inadmissible to show that such warranty, by reason of prior negotiations between the parties, was intended to include certain representations as to quality.

4. SAME—DAMAGES.

In an action to recover for failure to deliver twine of the quality called for by the contract, the proper measure of damages is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty. Neither the vendee's right of recovery, nor the measure of his damages, is dependent on a resale by him, or upon the price obtained at a resale.

¶ 4. See Sales, vol. 43, Cent. Dig. §§ 1285, 1287, 1298.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action by Jones against the Union Selling Company to recover damages for the breach of an express warranty of the quality of twine sold to him by the company under a written contract entered into at Hastings, Neb., June 6, 1900, which described the twine and stated the warranty in this manner: "30,000 pounds of Binder Twine, Crown Brand, as follows: 27,000 pounds Standard, eleven cents per pound; 3,000 pounds Sisal, eleven cents per pound. Gross weight, delivered F. O. B. cars at Hastings. * * * Quality guaranteed." The twine was then in cars at Council Bluffs, Iowa, was to be shipped in a few days, and was to be paid for in cash upon the presentation of the bill of lading. Delivery of the twine and payment of the purchase price were promptly made. The Selling Company was a distributor or wholesale dealer at Omaha, Neb., in the products of the Standard Rope & Twine Company's Mills, which included the Crown brand of binder twine. Jones was a retail dealer in farm implements and binding twine at Hastings, and purchased this twine for sale to farmers in that vicinity, to be used by them in binding their grain. He was not familiar with, and had not dealt in, twine of the Crown brand. All this was known to the company when the contract was made. In addition to the above matters, about which there was no dispute at the trial, plaintiff's petition alleged that, when the contract was made, the words "Quality guaranteed" were agreed by the parties to refer to a proposed guaranty mentioned in a letter from the Selling Company to Jones, dated March 7, 1900, and that this letter was made a part of the warranty. The letter was set forth in the petition, and the portion containing the proposed guaranty reads: "We are the manufacturers of the Sewell & Day and Crown brands of rope and binder twine, and do not hesitate to guarantee the quality of these grades of twine, to be superior to that of our competitors. We quote you: Sisal & Standard binder twine 11½¢. per lb., Manilla binder twine 14½¢. per lb., pure Manilla binder twine 16½¢. per lb., in small lots F. O. B. Omaha. If you could use 10,000 lbs. or more we could name you a lower price. The twine which we will furnish is all new, of this year's make and put up in the new style 50 lb. flat bales. We have no doubt, but that the quality of the twine which we can furnish will be entirely satisfactory to you and your customers." It was then alleged that the warranty respecting the "quality, character, and condition" of the twine was broken by the Selling Company. "That said twine was not of good quality, and was not suitable for the purposes for which it was purchased by plaintiff. The quality of said twine was not superior to that of the defendant's competitors, but, on the contrary, was grossly inferior to the ordinary and average binding twine then upon the market. That the quality of said twine was not satisfactory to plaintiff or to his customers, and was not of a character with which either plaintiff or his customers ought to have been satisfied. And said twine was not all new, of the make of 1900, but, on the contrary, said twine was old and unsound, knotty, uneven, and much of it rotten and otherwise defective, and practically of very little value." Damages in the sum of \$2,600 were alleged, and judgment was prayed for that amount. These matters were denied by the answer. A trial resulted in a verdict and judgment for plaintiff for \$675, which defendant seeks to have reversed upon this writ of error.

James H. McIntosh, for plaintiff in error.

T. J. Mahoney and J. B. Cessna, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal controversy in this case is over the quality of twine required to satisfy the terms of the express warranty in the written instrument in which the parties stated their agreement. At the trial

the court took the view that it was permissible to determine this by reference to the negotiations which preceded and resulted in the making of the written contract. These negotiations covered a period of three months, and consisted of letter correspondence and separate conversations between the plaintiff and each of two agents of the defendant. All were admitted in evidence over the objection of the defendant. This ruling proceeded upon the theory that the terms of the written contract were uncertain and ambiguous, and could be explained and made certain by extrinsic evidence. If the letter of March 7, 1900, be accepted as giving certainty to the terms of the warranty, it would be satisfied only by the delivery of new binding twine, of the make of 1900, and of a quality superior to that of any binding twine sold by any of the defendant's competitors, and entirely satisfactory to the plaintiff and his customers. If one or both of the conversations be accepted as giving certainty to the warranty, then it would be satisfied only by the delivery of twine of equal quality with certain samples shown to the plaintiff at Omaha by an agent of the defendant during one of these conversations. In the plaintiff's petition the position was taken that the warranty should be interpreted by reading into it the letter of March 7th, and no reference was made to any samples of twine as having such relation to the transaction that they would give precision to the terms of the warranty; but at the trial the plaintiff gave in evidence both the letter and the conversations, although in thus offering an alternative of inconsistent interpretations he was obscuring, rather than clarifying, the meaning of the warranty, and was illustrating the mistake in resorting to this class of evidence to ascertain what is intended by an agreement expressed in writing. The contract makes no reference to the letter of March 7th, or to samples exhibited during the oral negotiations, and does not suggest that either of these was in the minds of the parties when they reduced their agreement to writing, or that the whole agreement is not completely expressed therein. The law applicable to such a contract is nowhere better expressed than in *Thompson v. Libby*, 34 Minn. 374, 377, 26 N. W. 1. It was there said by Judge Mitchell:

"The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks. 2 Phil. Evidence (Cow. & H. Notes) 669; *Naumberg v. Young*, 44 N. J. Law, 331 [43 Am. Rep. 380]; *Hei v. Heller*, 53 Wis. 415 [10 N. W. 620]. And the law controlling the operation of a written contract becomes a part of it, and cannot be varied by parol, any more than what is written. 2 Phil. Ev. (Cow. & H. Notes) 668; *La Farge v. Rickert*, 5 Wend. 187 [21 Am. Dec. 209]; *Creery v. Holly*, 14 Wend. 26; *Stone v. Harmon*, 31 Minn. 512 [19 N. W. 88]."

The rules embodied in this statement of the law are firmly established, and have been frequently declared in the decisions of this court and of the Supreme Court. *Bast v. Bank*, 101 U. S. 93, 96, 25

L. Ed. 794; *De Witt v. Berry*, 134 U. S. 306, 315, 10 Sup. Ct. 536, 33 L. Ed. 896; *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837; *Harrison v. Fortlage*, 161 U. S. 57, 63, 16 Sup. Ct. 488, 40 L. Ed. 616; *Wilson v. New U. S. Cattle Ranch Co.*, 20 C. C. A. 245, 249, 73 Fed. 994; *Grand Avenue Hotel Co. v. Wharton*, 24 C. C. A. 441, 443, 79 Fed. 43; *Godkin v. Monahan*, 27 C. C. A. 410, 83 Fed. 116; *Insurance Co. v. McMaster*, 30 C. C. A. 532, 540, 87 Fed. 63; *Green v. Chicago, etc., Ry. Co.*, 35 C. C. A. 68, 71, 92 Fed. 873; *Franklin v. Browning*, 54 C. C. A. 258, 117 Fed. 226; *Wilson v. Deen*, 74 N. Y. 531, 534; *Mast v. Pearce*, 58 Iowa, 579, 8 N. W. 632, 12 N. W. 597, 43 Am. Rep. 125; *Phillips v. Iola Portland Cement Co. (C. C. A.)* 125 Fed. 593, 596; *McQuaid v. Ross*, 77 Wis. 470, 46 N. W. 892; *J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 605, 63 N. W. 1013; *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621, 625, 75 N. W. 1092.

Where, without fraud, accident, or mistake, the written contract purports to be a memorial of the transaction, it supersedes all prior representations, proposals, and negotiations, and is conclusive evidence that it embodies such of these as were ultimately intended to become parts of the agreement, and that all others were rejected as not expressing the final intention of the parties. *Bast v. Bank*, 101 U. S. 93, 96, 25 L. Ed. 794. If there is uncertainty or ambiguity in the terms employed, the actual condition of things, and the position in which the parties stood at the time of making the contract, may be shown for the purpose of ascertaining the meaning of its terms. *Reed v. Insurance Co.*, 95 U. S. 23, 30, 24 L. Ed. 348; *Phelps v. Clasen*, 1 Woolw. 206, 212, 19 Fed. Cas. 445, No. 11,074. That which may be so shown is frequently spoken of as the surrounding circumstances, but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement. These cannot be thus ingrafted upon it. *Union Stock, etc., Co. v. Western, etc., Co.*, 7 C. C. A. 660, 668, 59 Fed. 49; *Bast v. Bank*, 101 U. S. 93, 97, 25 L. Ed. 794; *Oelrichs v. Ford*, 23 How. 49, 63, 64, 16 L. Ed. 534; *Ferguson Contracting Co. v. Manhattan Trust Co.*, 55 C. C. A. 529, 533, 118 Fed. 791. *Bradley v. Steam Packet Co.*, 13 Pet. 89, 92, 103, 10 L. Ed. 72, involved the use of extrinsic evidence to ascertain the meaning of a written contract "for the use of the steamboat Franklin, until the Sydney is placed on the route to Potomac Creek." A controversy arose as to whether this covered the time when navigation was so completely stopped by ice that no boat could be used. It was held permissible to prove the circumstances which accompanied the transaction, viz., that the defendant for several years had been, and then was, contractor for the transportation of the mail from Washington, D. C., to Fredericksburg, Md.; that the customary route of the mail was by steamboat from Washington to Potomac Creek, and thence by land to Fredericksburg; that the defendant kept an establishment of horses and stages for the transportation of the mail all the way by land at seasons when the navigation of steamboats was stopped by ice; that, when the contract was made, defendant's own steamboat had become disabled, and he was then about completing a new

boat, called the "Sydney"; that it was matter of notoriety, and was known to and understood by plaintiff, when the contract was made, that as soon as navigation should be closed by ice the mail from Washington to Fredericksburg would have to be transported all the way by land, instead of being transported by steamboat to Potomac Creek, and thence by land to Fredericksburg; and that the steamboat Franklin would not be required by defendant, and could not be used by him, when the navigation should be closed. It was further held, in that connection, that it was not permissible to prove that, in the negotiations antecedent to the making of the written contract, it was communicated to the plaintiff by defendant or his agent that the defendant intended to keep the steamboat Franklin in use so long as the navigation remained open, and no longer. *Gilbert v. Moline Plow Co.*, 119 U. S. 491, 7 Sup. Ct. 305, 30 L. Ed. 476, was an action upon a letter of guaranty in which it was attempted to be shown by parol that a prior letter of the person who obtained credit by reason of the letter sued upon was to be taken as an explanation or part of the latter, but this was held not permissible, as the letter of guaranty contained no reference to the prior letter, and appeared to be complete in itself. *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775, was an action upon a written contract for the purchase of "300 bushels of barley," the quality of which was not expressly specified. It was sought to be shown by parol that the purchase was made by sample, and that the barley tendered under the contract was not of as good quality as the sample. In holding the evidence inadmissible, the court said:

"* * * For the purposes of this case, it is unnecessary to determine whether the merchantable quality of the barley to be delivered is a legal implication from the terms of the contract or not. It is enough for the determination of this case to know that there is neither an express statement in the writing, nor a legal implication from what is stated, that the barley was sold by sample, or that it should be of the quality of a sample furnished to the buyer at the time of the contract. This court has repeatedly held that where there is a written instrument binding upon both of the parties thereto, which in itself is a complete contract, capable of being understood and enforced, parol evidence cannot be resorted to to change its express provisions or their legal effect."

Gardiner v. Gray, 4 Camp. 144, was an action upon a written contract for the sale of what was described as "12 bags of waste silk." In rejecting parol proof of a sale by sample offered for the purpose of establishing the quality of the commodity intended to be sold, Lord Ellenborough said:

"I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be superadded by parol testimony."

The same ruling was made in *Meyer v. Everth*, 4 Camp. 22.

The law controlling the operation of a contract is deemed to be, and usually is actually, within the contemplation and intention of the parties, as much as the words in which it is expressed, and becomes equally an essential part of it. *Walker v. Whitehead*, 16 Wall. 314, 317, 21 L. Ed. 357; *Bulkley v. United States*, 19 Wall. 37, 40, 22 L. Ed. 62; *Hearne v. Ins. Co.*, 20 Wall. 488, 493, 22 L. Ed. 395;

Rogers v. Kneeland, 10 Wend. 219, 252; Johnston v. King, 83 Wis. 12, 53 N. W. 29; Manistee, etc., Co. v. Shores Lumber Co., 92 Wis. 28, 65 N. W. 865. For this reason the rule that a written contract cannot be varied by parol extends to the legal import or intendment of the contract, as well as to the terms or words in which it is written. The Delaware, 14 Wall. 579, 20 L. Ed. 779; Renner v. Bank of Columbia, 9 Wheat. 581, 587, 6 L. Ed. 166; Bank of United States v. Dunn, 6 Pet. 51, 8 L. Ed. 316; Brown v. Wiley, 20 How. 442, 447, 15 L. Ed. 965; Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647; Meehan v. Valentine, 145 U. S. 611, 625, 12 Sup. Ct. 972, 36 L. Ed. 835; Godkin v. Monahan, 27 C. C. A. 410, 83 Fed. 116; Mills v. Miller, 4 Neb. 441, 443; Wilson v. Deen, 74 N. Y. 531, 534; Thompson v. Libby, *supra*. A contrary view was declared by Mr. Justice Washington in *Susquehanna, etc., Co. v. Evans*, 23 Fed. Cas. 450, No. 13,365, but it was rejected by the Supreme Court in *Bank of United States v. Dunn* and *Martin v. Cole*, *supra*.

Turning now to the facts of the case under consideration, it was shown at the trial, as before stated, that the actual condition of things and the situation of the parties at the time of the making of this contract, and then understood and known by both of them, were these: The plaintiff was a retail dealer in binding twine, and was about to buy a supply of that commodity for sale to the farmers of his vicinity for use in binding grain; the defendant was a wholesale dealer in, or distributor of, binding twine of a brand or manufacture with which the plaintiff was not familiar; and the twine which became the subject of the sale was at a point remote from that where the contract was made, and therefore not open to the inspection of the plaintiff. Under these circumstances, the parties entered into a written contract for the sale by the defendant to the plaintiff of "30,000 pounds of binder twine * * * 27,000 pounds standard * * * 3,000 pounds sisal. * * * Quality guaranteed." It is not certain that there is any difficulty in understanding its language or effect when the face of the contract alone is considered, but, read in the light of these surrounding circumstances, which were competently proven, the meaning of the words employed and the intention of the parties are clear, and there is no doubt that the agreement is completely expressed. The legal import or intendment of such a contract is that the seller warrants that the article delivered shall, conformably to its description, be binder twine—that is, reasonably fit for the use for which binder twine is designed—and shall be salable or marketable under that description. This is the rational meaning, and in law the effect, of a warranty of quality, where no special quality is named and no words of limitation are used. *Gardiner v. Gray*, 4 Camp. 144; *Jones v. Just*, L. R. 3 Q. B. 197; *Dushane v. Benedict*, 120 U. S. 630, 636, 7 Sup. Ct. 696, 30 L. Ed. 810; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 3 Sup. Ct. 537, 28 L. Ed. 86; *Van Winkle v. Crowell*, 146 U. S. 42, 49, 13 Sup. Ct. 18, 36 L. Ed. 880; *Cleveland Linseed Oil Co. v. Buchannan*, 57 C. C. A. 418, 120 Fed. 906; *Omaha, etc., Co. v. Fay*, 37 Neb. 68, 75, 55 N. W. 211; *Hastings v. Lovering*, 2 Pick. 214, 13 Am. Dec. 420; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *Howard*

v. Hoey, 23 Wend. 350, 35 Am. Dec. 572; *Hoe v. Sanborn*, 21 N. Y. 552, 562, 78 Am. Dec. 163; *Id.*, 36 N. Y. 93, 98; *Merriam v. Field*, 29 Wis. 640; *Best v. Flint*, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570; *Benjamin on Sales*, §§ 656, 657; 2 *Story on Contracts*, § 1071; 1 *Chitty on Contracts*, 634; 2 *Addison on Contracts*, p. *975; *Tiffany on Sales*, 173.

The effect of permitting the plaintiff to prove the antecedent negotiations was to establish a standard for determining whether the warranty had been satisfied, and the extent of any departure therefrom, which was different from the standard which the parties had established for themselves by their final agreement expressed in writing. This was error.

Error is also assigned upon an instruction given to the jury to the effect that the price obtained by the plaintiff upon resales by him of the twine could not be considered in assessing his damages for the breach of warranty in the sale by the defendant. The plaintiff testified that the value of twine conforming to the warranty would have been 13 cents per pound, while 5 cents per pound was the full value of the inferior twine actually delivered. It was shown that most of the twine had been resold by the plaintiff at prices ranging from about 9 cents to 11 cents per pound, and that these sales were all with a warranty of quality. The proper measure of damages applicable to a case like this is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty. *Schreiber v. Andrews*, 41 C. C. A. 663, 666, 101 Fed. 763. And neither the vendee's right of recovery, nor the measure of his damages, is dependent upon a resale by him or upon the price obtained at a resale. At most, the price thus obtained may be some, but not conclusive, evidence of the actual value. *Muller v. Eno*, 14 N. Y. 597, 607, 609; *Bach v. Levy*, 101 N. Y. 511, 515, 5 N. E. 345; *Brock v. Clark*, 60 Vt. 551, 15 Atl. 175; *Atkins v. Cobb*, 56 Ga. 86, 90; *Reggio v. Braggiotti*, 7 Cush. 166, 169; *Clare v. Maynard*, 7 C. & P. 741, 32 E. C. L. 849. But where the resale is with a warranty of quality, or in ignorance of the actual quality, it is not any evidence of the value of the article in its inferior condition. *Muller v. Eno*, *supra*; *Brown v. Bigelow*, 10 Allen, 242; *Miamisburg, etc., Co. v. Wohlhuter*, 71 Minn. 484, 74 N. W. 175. There was no error in this instruction.

The judgment is reversed, with a direction to grant a new trial.

(128 Fed. 679.)

GENTRY v. SINGLETON.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1904.)

No. 1,853.

1. EVIDENCE—MATERIALITY.

Where all the facts of a transaction are clearly stated by a witness, his inference or understanding therefrom is wholly immaterial and inadmissible.

2. TRIAL—DIRECTION OF VERDICT.

When the evidence so conclusively entitles one party to a verdict that a verdict for his opponent would have to be set aside, the court may properly direct a verdict in his favor.

3. SAME—TITLE ACQUIRED—POSSESSION OF SELLER AS EVIDENCE OF OWNERSHIP.

Mere possession of personal property by the seller, if there be no other evidence of ownership or power of disposal, will not preclude a third person, who is the true owner, from reclaiming his property or its value from the purchaser.

4. PARTNERSHIP—WHAT CONSTITUTES—EMPLOYÉ RECEIVING SHARE OF PROFITS.

A mere employé engaged to render service in conducting a business, although he is to receive a share of the profits as compensation for his services, is in no sense a partner, and has no power to sell property of his employers, where he has never been held out by them as having such authority.

5. PARTIES—OBJECTION TO NONJOINER—WAIVER.

Under Mansf. Dig. Ark. §§ 5028, 5031, extended to Indian Territory, providing that a nonjoinder or defect of parties, where the objection is not raised by demurrer to the complaint or by answer, is waived, the right of a plaintiff to recover the value of property converted by defendant cannot be contested on the trial on the ground that the property was owned by plaintiff and a third person in partnership, and especially where such third person testified in plaintiff's behalf, and is thereby estopped to assert any interest in the property as against defendant.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 69 S. W. 898.

N. A. Gibson, Benj. Martin, Jr., and N. B. Maxey, for plaintiff in error.

Preston C. West, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was an action in the United States Court for the Indian Territory by Singleton against Gentry to recover the value of 56 steers alleged to have been the property of the plaintiff, and to have been converted by the defendant to his own use. A trial by jury resulted in a judgment for plaintiff, which was affirmed by the Court of Appeals for the Indian Territory. Gentry v. Singleton, 69 S. W. 898. It is complained, first, that at an early stage of the trial the court held that, if the defendant desired to contend that the number of steers included in the transactions under ex-

¶ 4. See Partnership, vol. 38, Cent. Dig. § 43.

amination was less than 56, he must carry the burden of proving that fact. Even if the ruling was erroneous when made, no harm or prejudice resulted from it, because thereafter it was affirmatively shown by uncontradicted evidence produced by plaintiff, and also by evidence produced by defendant, that 56 was the correct number. It is complained next that defendant was, by several rulings at the trial, unduly restricted in the cross-examination of John A. Skaggs, a witness for plaintiff. If there was error in this, it was equally without harm or prejudice, because defendant subsequently amended his answer, and then, without any restriction, proceeded with the cross-examination of the witness, and fully interrogated him upon every matter covered by these rulings. Another complaint is that Charles Bruner, a witness for defendant, was not permitted to answer the question, propounded by defendant: "Who did you understand you were selling the cattle to?" Bruner, who was then the owner of the steers, sold them shortly before the alleged conversion, and the purpose of his examination was to show to whom the sale was made—whether to plaintiff, or to plaintiff and others, including one Henry, to be mentioned later. Bruner's recollection of the transaction seemed entirely clear, and he was permitted to testify to all that was said and done at the time of the sale. The inference or understanding to be properly drawn from what occurred at that time was to be determined by the court and jury, and the unexpressed thought or understanding of the witness was wholly immaterial.

The principal reliance for a reversal is upon the action of the court, at the conclusion of the evidence, in instructing the jury to return a verdict for the plaintiff, leaving for the jury's determination only the amount of damages. In this the court followed the established rule that, when the evidence so conclusively entitles one party to a verdict that a verdict for his opponent would have to be set aside, the court may direct a verdict for the party entitled to it. *Elliott v. Chicago, etc., Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Coughran v. Bigelow*, 164 U. S. 301, 307, 17 Sup. Ct. 117, 41 L. Ed. 442; *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 492, 17 Sup. Ct. 158, 41 L. Ed. 524; *Motey v. Pickle, etc., Co.*, 20 C. C. A. 366, 74 Fed. 155; *Ponder v. Jerome Hill Cotton Co.*, 40 C. C. A. 416, 100 Fed. 373; *Cudahy Packing Co. v. Marcan*, 45 C. C. A. 515, 106 Fed. 645, 54 L. R. A. 258. This case comes well within this rule. The uncontradicted evidence showed this state of facts: Singleton and the witness Skaggs entered into an arrangement whereby the latter was to buy cattle in the Indian Territory with money supplied by the former, and the cattle were to be taken to Kansas by Skaggs, and there sold, and the profits divided equally between them. Skaggs then entered into an arrangement with one Henry, whereby the latter, or a man furnished by him for the purpose, was to assist Skaggs in caring for the cattle and in taking them to Kansas, and was to receive as compensation for this service one-half of the profits to which Skaggs would be entitled. Henry was to have no interest in the cattle, and was not to have authority to buy or sell. Singleton assented to this arrangement. Skaggs and Henry subsequently went to the home of the witness Bruner, and the 56 steers before named were then purchased from

him. The negotiations leading to the purchase were entirely between Skaggs and Bruner, and the steers were paid for by Skaggs' individual bank checks, drawn against money supplied by Singleton. Henry was introduced to Bruner by Skaggs as "the man that is helping me with the cattle." The steers were to remain for a short time in the pasture of Bruner, without his being responsible for them; Skaggs stating "that he or Mr. Henry would be around there to look after the cattle." A few days later, Skaggs branded the steers with a brand in which Henry is not claimed to have had any interest. Without the permission or knowledge of Singleton or Skaggs, Henry took the steers from Bruner's pasture and sold them, with other cattle of his own, to defendant, who bought, shipped, and sold the steers without knowing their true ownership, or Henry's relation to them. There was some evidence to the effect that prior to this transaction Henry and Skaggs had been together much, and that it was "understood" in the community that Henry was "associated or connected" with Skaggs in the "cattle business"; but there was no evidence that either Singleton or Skaggs had held Henry out as a partner, or as authorized to buy or sell cattle on behalf of either or both of them, or as having an interest in the steers. Nor was there any evidence that Henry had made any other sale of cattle belonging to Singleton and Skaggs, or either of them. Neither Singleton nor Skaggs received any part of the purchase price paid to Henry, or otherwise ratified the sale to defendant. After learning what had been done with the steers, and without unreasonable delay, Skaggs informed defendant of their true ownership, and of the unauthorized character of the sale. Referring to this, the defendant testified:

"Q. You stated, I understood, Mr. Gentry, that, whilst your communications were going on about a settlement with Mr. Skaggs and Mr. Singleton, that you received a telegram from Mr. Henry to hold onto those cattle—that he would guaranty the title? A. I received a telegram at Checotah signed 'J. N. Henry.' I don't know anything about it. Q. You were then informed that Henry was the man that sold you the cattle, and that he had no right to sell them to you, and you made no inquiry about Henry? You had been informed that Henry had no right to sell those cattle when Skaggs came there? You knew where Henry was, because you got a telegram telling you to hold onto them? A. Yes, sir. Q. That he would defend them in any court? A. Yes, sir. Q. You relied on that, and did not make any further effort to collect from Henry? A. Yes, sir."

Henry soon left the country and his whereabouts were thereafter unknown. As bearing upon the ownership of these steers, as between plaintiff and Skaggs, plaintiff testified:

"Q. Were you the owner of the cattle sued for in this action? A. Yes, sir."

Skaggs was a witness, and did not assert any right or claim against defendant, but testified on behalf of plaintiff:

"Q. For whom were you buying cattle? A. For Mr. Singleton. Q. The plaintiff in this action? A. Yes, sir."

The principles of law which determine the rights of litigants upon such a state of facts are few and well recognized. The general rule, predicable of a simple transfer from one party to another, where no other element intervenes, is that no one can transfer a better title to personal property than he himself possesses. To do more, he must be

clothed with power of disposal by the true owner, or must be held out by him as possessing such power, and an innocent third party must rely upon this apparent authority, or the transfer must be ratified or confirmed by the true owner after it is brought to his notice. Ownership usually carries with it the right to possession, and the relation between the two is such that possession may properly be said to be *prima facie* evidence of ownership, but it is not more. Ownership is the principal thing, and ordinarily controls the possession, which is secondary or incidental. Whoever buys from one in possession must see to it that he has some title or authority other than that which is conferred by mere possession, because the possessor may be a thief or a servant without power of disposal, neither of whom can give a good title, no matter how innocent the purchaser may be, or how much he may pay for the property. It follows that mere possession of the vendor, however acquired, if there be no other evidence of ownership or power of disposal, will not preclude a third person, who is the true owner, from reclaiming his property or its value from the vendee. *Mechem on Sales*, §§ 154-159; *Stanley v. Gaylord*, 1 Cush. 536, 48 Am. Dec. 643; *Baker v. Taylor*, 54 Minn. 71, 55 N. W. 823; *Jetton v. Tobey*, 62 Ark. 84, 34 S. W. 531. In one view of the evidence, the possession of Henry was that of a thief, and in no possible view was it of a higher order than that of a servant without authority to sell. In neither view could he transfer the title to defendant.

It is urged that the arrangement between Skaggs and Henry, made with Singleton's assent, constituted Henry a partner in the business in which Singleton and Skaggs were engaged, and empowered him, as to third parties, to make sales of the partnership property. While the general rule is that participation in profits is presumptive evidence of partnership, an employé or servant who has no power as a partner in the firm, and no interest in the profits, as property, and who is simply engaged as an employé or servant, and is to receive a stated sum out of the profits, or a proportion of the same, as compensation for his services, is not a partner in any sense. This is also true of one who receives part of the profits of a commercial partnership only by way of compensation for a loan of money. *Berthold v. Goldsmith*, 24 How. 536, 542, 543, 16 L. Ed. 762; *Meehan v. Valentine*, 145 U. S. 611, 619, 624, 12 Sup. Ct. 972, 36 L. Ed. 835; *The J. P. Donaldson*, 167 U. S. 599, 605, 17 Sup. Ct. 951, 42 L. Ed. 292; *Stevens v. McKibbin*, 15 C. C. A. 498, 68 Fed. 406; *Randle v. Barnard*, 26 C. C. A. 568, 81 Fed. 682; 1 *Bates on Partnership*, §§ 36, 37. The evidence clearly shows that Henry furnished his own labor, or that of another person provided by him, as an employé or servant; that he had no power or voice in the management of the business; and that he had no interest in the profits, other than that the compensation for his labor, or that furnished in its stead, was measured by a certain proportion of the profits. He was not a partner.

The evidence conclusively entitled the plaintiff to a verdict, and made it the duty of the court to direct the jury accordingly, unless there was some obstacle in a matter yet to be noticed.

It is insisted on behalf of defendant that the arrangement between Singleton and Skaggs possessed such elements as made it a partner-

ship, and thereby invested the title to the steers, and the right to recover for their conversion, in the two partners jointly, instead of Singleton alone. Pomeroy's Code Remedies, § 223. But in our view of defendant's situation and Skaggs' relation to this action when the court came to instruct the jury, it is unnecessary to determine whether the agreement between Singleton and Skaggs made them partners, or, if it did, whether Singleton alone could ordinarily recover more than his portion of the damages. See 1 Chitty on Pleadings (16th Am. Ed.) p. *75; 1 Sutherland on Damages, §§ 134, 137. Under the Statutes of Arkansas, which have been extended to the Indian Territory (Mansf. Dig. §§ 5028, 5031; Ind. T. Ann. St. 1899, §§ 3233, 3236), a non-joinder or defect in parties plaintiff, not raised by demurrer to the complaint or by answer, is waived. *Yonley v. Thompson*, 30 Ark. 399, 401; *Clark v. Gramling*, 54 Ark. 525, 528, 16 S. W. 475; *Seip v. Tilghman*, 23 Kan. 289; *Bliss on Code Pleading*, § 411. No suggestion of a defect in parties was made by demurrer or answer, and thereafter defendant was not in a situation to complain that Skaggs had not been joined as a party plaintiff. For another reason Skaggs was precluded from asserting a right of recovery against defendant. He had fully acquiesced in the prosecution of this action, wherein Singleton asserted exclusive ownership of the steers, and sought to recover the entire damages; and he had given material support to Singleton's claim by giving testimony, as before shown, which was inconsistent with any right of recovery in himself. Skaggs was therefore estopped, as against defendant, from claiming any interest in the property converted. *Sullivan v. McConnell*, 19 C. C. A. 400, 73 Fed. 130; *Barney v. Dewey*, 13 Johns. 224, 7 Am. Dec. 372; *Hobbs v. McLean*, 117 U. S. 567, 580, 6 Sup. Ct. 870, 29 L. Ed. 940; *Birdsell v. Shaliol*, 112 U. S. 485, 487, 5 Sup. Ct. 244, 28 L. Ed. 768; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476, 492. And defendant was in no danger of being compelled to respond twice for the same act of conversion.

There was no error in directing a verdict for plaintiff. The judgment is affirmed.

(128 Fed. 683.)

THE EDMUND L. LEVY.

(Circuit Court of Appeals, Second Circuit. March 4, 1904.)

No. 116.

1. TOWAGE—LIABILITY OF TUG FOR INJURY TO TOW.

The agreement of a boat to be towed at her own risk does not exempt the tug from liability for damages occasioned by her own negligence, or the failure of the master, who is responsible for the navigation of both vessels, to exercise ordinary care and skill to see that the tow is properly made up, and that the hawsers are of proper length, strong, and securely fastened, because such liability does not arise out of the towage contract, but is imposed by law. On the other hand, the master of a boat, who offers her as a tow, represents her as sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage, and the tug is not liable for damages resulting from the weakness, decay,

¶ 1. See *Towage*, vol. 45, Cent. Dig. §§ 15, 19, 28, 29.

or leaks of the tow, or other defects which render her unseaworthy, and which are not known or obvious to the master of the tug.

2. **SAME—NEGLIGENCE OF TUG—EVIDENCE CONSIDERED.**

Evidence considered, and *held* not to sustain the claim of a libellant that the sinking of a canal boat, while being towed by a tug through floating ice, was due to the negligence of the tug in using a hawser from 125 to 150 feet long, but to show by a preponderance that under the circumstances such length was a proper one, and that the tow was properly made up and carefully navigated.

Appeal from the District Court of the United States for the Eastern District of New York.

This is an appeal by the claimant, Thomas Quigley, from a final decree, entered February 14, 1903, in favor of the libellant, John O'Connor, for \$1,834.55 on account of damages sustained by his canal boat, E. Remington & Sons, because of alleged negligence of the tug *Levy* while towing the canal-boat through the ice in the upper Hudson river in December, 1900. The facts are accurately stated in the decision of the court below.

J. Parker Kirlin and Amos Van Etten, for appellant.
Nelson Zabriskie, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. There is no dispute that the condition of the river as to ice, for some distance below Albany, was known to the master of the *Remington* before the voyage commenced. By the terms of the contract the canal-boat was to take the risk of ice and weather, the tug agreeing to tow her only so far as the existing conditions would permit. But, as is aptly stated by the District Judge:

"Because the canal-boat assumed the risk of ice, she did not thereby authorize towing in the same manner as if the ice were absent."

We do not deem it important to discuss with greater particularity the terms of the contract for the reason that it did not change the reciprocal obligations which the law devolved upon the parties.

The tug was neither a common carrier nor an insurer of the boat or her cargo. She was not required to exercise the highest degree of skill, but reasonable diligence and care only. She was bound to know the channel and whether she could complete the voyage with safety, so far as safety depended upon known facts, or facts easily capable of ascertainment. The agreement of the canal-boat to be towed at her own risk did not exempt the tug from liability for damages occasioned by her own negligence. That liability does not arise out of the towage contract, but is imposed by law. The master of the tug was the pilot of the voyage and responsible for the navigation of both vessels. It was his duty to exercise ordinary diligence to see that the tow was properly made up, that the hawsers were of the proper length, strong and securely fastened. On the other hand, the master of a boat offering her for towage represents her as sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage. If she be unseaworthy by reason of weakness, decay or leaks and such defects are not obvious to the master of the tug he will be absolved from responsibility where such unseaworthiness causes the damage complained

of. The tug undertakes only for that degree of skill, care and prudence necessary for the management of a seaworthy boat. The *Margaret*, 94 U. S. 494, 24 L. Ed. 146; The *Quickstep*, 9 Wall. 670, 19 L. Ed. 767; The *Lady Pike*, 21 Wall. 1, 22 L. Ed. 499; The *William Murtaugh* (D. C.) 3 Fed. 404; The *Syracuse*, 6 Blatchf. 2, Fed. Cas. No. 13,717; The *Florence* (D. C.) 88 Fed. 302.

Various faults were alleged in the libel, but it is unnecessary to consider any except the charge that the tug was negligent in towing with too long a hawser. On this ground alone she was inculpated by the District Judge. He says:

"After much consideration and some doubt, it seems to the court that it was not prudent to carry the tow on so long a hawser, breaking a channel proportioned to the width of the tug, and probably little more than the width of the canal-boat, so that sheering on the hawser would bring the canal-boat with considerable violence against the ice on either side. It is perfectly apparent that a hawser 150 feet long would permit unnecessary sheering or swinging, and that the tow would be to a greater extent ungovernable. Whatever doubt exists from the conflicting statements of the parties, the balance would seem to turn in favor of the libelant, by the evidence of Mr. Briggs, who was a man of obvious character and understanding, and familiar with the river and navigation through ice therein."

We find ourselves unable to concur in this conclusion for the following reasons:

First.—In our judgment the preponderance of evidence tends to establish the proposition that a hawser from 125 to 150 feet in length was a proper one to use. The tow was arranged in tandem fashion shortly after leaving Cocksackie. The master of the canal-boat, who had 40 years' experience on the river and had been frequently towed through floating ice, made no complaint of the length of the line at this time. He does not say that the length was unusual or improper. There is testimony that at one time he called to the tug to shorten the line, but this was after the final bump was given, near New Baltimore, to which the sinking of the boat is attributed. At the trial he testified that in his judgment a 70-foot hawser would have been long enough. The only other witness for the libelant was John N. Briggs, the consignee of the cargo, who evidently impressed the court as a most intelligent and disinterested witness. He is engaged in the ice and coal business at Coeymans and was certainly not qualified to express an expert opinion upon the question in controversy. He testified that the hawser should not have been more than 30 or 40 feet at the most. Opposed to this extremely meager and unsatisfactory testimony is the opinion of several experienced river pilots, two of whom have spent over 30 years in navigating the Hudson, that not only was the hawser of the usual and proper length, but that it would have been impossible to handle the tow in the ice with a shorter line. Not alone in the number of the witnesses, but also in their experience, does the testimony of the claimant far outweigh that of the libelant.

Second.—The District Judge had the great advantage of seeing and hearing the witnesses and, in ordinary circumstances, his finding upon a disputed question of fact would not be disturbed on appeal, but the rule is not applicable to the present controversy for the reason that it is presented in this court upon a somewhat different state of facts.

The District Judge was in doubt, and it is evident that the testimony of Mr. Briggs finally induced him to resolve that doubt in favor of the libellant. Indeed, he says so explicitly. Twice in the opinion Mr. Briggs is referred to; once as "a very reliable witness" and, again, as "a man of obvious character and understanding." It is probable that this reliance upon the testimony of Mr. Briggs was due in a great measure to the fact that he testified that he had no interest in the controversy. On the reference to compute the amount of damages he presented claims aggregating \$167 and was allowed by the commissioner \$204, which included a partial loss on the cargo of \$164. In an evenly balanced case these facts, if known to the trial judge, might have turned the scales the other way. Without imputing any intentional wrong to Mr. Briggs we are unable, upon the record now presented, to regard him as "a very reliable witness."

Third.—The use of a long hawser is supported by reasoning which seems to be based on experience not only but upon common sense. Assuming that the use of a hawser 30 or 40 feet in length would have a tendency to lessen the swinging of the tow, a point which is by no means clear on the proof, it seems reasonably certain that this would only be substituting one danger for another. With a short line the boat would get all the force of the quick water from the wheel, thus making her less steady and harder to tow. It would also subject her to the danger of having ice thrown with all the force of the back-wash against her bow. In addition to this the danger of collision would be serious. It frequently happens, indeed it happened upon the morning in question, that upon entering a field of ice the progress of the tug is impeded and almost stopped. In such circumstances the tow, being only 40 feet behind, would inevitably overtake the tug and crash into her stern. The master of the tug in arranging his tow should place the boats in the positions which experience has shown to be the safest, taking into consideration all the dangers to be apprehended. We think this was done in the present instance. A hawser 125 to 150 feet in length seems to combine the two essentials of avoiding the back-wash and at the same time enabling the tug to keep command of the tow.

Fourth.—It appears from the libellant's testimony that the first severe blow, the one which caused the disaster, was received not on the side but "right on the bow" of the canal-boat. Such a blow could hardly be attributed to the yawing of the boat. It might have happened with a short hawser, or two hawsers, or with the boat lashed to the side of the tug. The assertion that it was the result of using a hawser 150 feet in length seems hardly warranted by the proof. Again, the channel was a crooked one and it was impossible to avoid some sheering as the tow swung around the turns. The boat was down at the head and had a starboard list; she had no rudder. Had she been properly loaded it is not unlikely that her tendency to sheer would have been overcome, to some extent, at least.

Fifth.—The burden was upon the libellant to establish negligence by a preponderance of testimony and we think he has failed to do so. It is unnecessary to consider the other accusations against the tug. The trial judge unquestionably selected the strongest ground upon which

to sustain a finding of negligence and, by implication, at least, he found with the claimant upon the other allegations of fault. The tow was properly made up in tandem fashion and with the Remington, which was the heaviest loaded boat, ahead. The libelant admits this and the testimony shows that it would have been practically impossible to have towed the boats abreast or in any other way than the one adopted. It would have been an idle proceeding to have sent the tender, the tug Caswell, ahead to break a channel. The Levy was perfectly competent to do this, and did do it. The Caswell's place was with the tow rendering such assistance as was in her power. During the greater part of the time, after leaving Cocksackie, she was made fast to the port side of the Remington. The allegation that the speed of the tug was excessive is unsupported by the proof. On the contrary it appears that it took her about five hours to make the distance of eight miles between Cocksackie and New Baltimore. She towed with care and at times barely made steerage way.

The decree of the District Court is reversed, with costs, and the cause is remanded with instructions to dismiss the libel, with costs.

(128 Fed. 687.)

THE ONEIDA.

(Circuit Court of Appeals, Second Circuit. March 21, 1904.)

No. 78.

1. SHIPPING—DAMAGE TO CARGO—BURDEN OF PROVING SEAWORTHINESS.

In a suit to recover for loss of cargo by the sinking of a ship, the burden of proving seaworthiness at the beginning of the voyage rests upon the shipowner.

2. SAME—SEAWORTHINESS—INSTABILITY DUE TO IMPROPER LOADING.

A vessel cannot be said to be seaworthy for a voyage where, at its inception, she has little, if any, metacentric height, and a list of 8 or 9 degrees, and her cargo weight is so distributed that her instability must increase as she proceeds from the consumption of coal and water.

3. SAME—HARTER ACT.

A ship started on her voyage with a list of 8 or 9 degrees, which increased to such an extent, in consequence of her improper loading, that it was imprudent to proceed, and she put in at an intermediate port. Having opened a port to readjust the cargo while lying at a pier, the ship gave a sudden lurch, which brought the port under water, and she sank, damaging the cargo. *Held*, that the damage was attributable to her initial instability, which rendered her unseaworthy at the beginning of the voyage, and for the consequences of which the owners were not exempted from liability by the Harter act.

4. SAME—MEASURE OF DAMAGES—VALUE OF DAMAGED CARGO.

A ship carried a cargo of cotton from Charleston to New York, from which place it was to be forwarded to Liverpool, but under a separate and independent contract of affreightment. The bill of lading provided that in case of loss or damage the value of the cotton in Charleston at the time

¶ 1. Implied warranty of seaworthiness, see note to *The Carib Prince*, 15 C. C. A. 388.

See *Shipping*, vol. 44, Cent. Dig. § 482.

¶ 3. Statutory exemption of shipowners from liability, see note to *Nord Deutscher Lloyd v. President of Insurance Co. of North America*, 49 C. C. A. 11.

of shipment should be taken as the basis for computing the damages. The cotton was damaged before its delivery in New York through the unseaworthiness of the ship. *Held*, that the contract of carriage terminated in New York, and the ship was entitled to credit for the value of the cotton in its damaged condition in that market, and not in the Liverpool market, and that it was error to give credit for the proceeds of its sale in Liverpool, less the freight from New York, the amount being materially less than would have been realized by its sale in New York.

5. SAME—ERROR OF SURVEYORS—ESTOPPEL.

The cotton was shipped to Liverpool for sale in compliance with the recommendation of the surveyors who adjusted the loss, and with the knowledge of the shipowners, who made no objection. *Held*, that they were not bound by the erroneous decision of the surveyors, nor estopped to claim credit for the New York value of the cotton, where they at no time gave a positive assent to the substitution of the Liverpool value.

6. SAME—MEASURE OF DAMAGES.

Under a bill of lading for cotton to be carried from Charleston to New York, which provided that loss or damage to the cotton should be computed on the basis of its value at the time and place of shipment, where it was delivered in New York in a damaged condition, the shipowner is not entitled to have the amount of the freight deducted from its value as ascertained pursuant to such provision.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal by the Clyde Steamship Company, as claimant and owner of the steamship *Onelda*, from the final decree of the District Court of the Southern District of New York, in favor of the libellant, entered February 17, 1903, for the sum of \$40,112.82. The libellant, J. Raymond Smith, is assignee of the owners and underwriters of the cargo of the *Onelda* which was damaged by reason of the sinking of the ship at Pier 29, East river, New York, on September 21, 1897. The opinion of the District Court holding the *Onelda* liable is reported in 108 Fed. 886.

Henry Galbraith Ward and Charles H. Hough, for appellant.
Wilhelmus Mynderse, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. We concur in the conclusion of the District Court that the *Onelda* was unseaworthy when she left Charleston. A few words only need be added. The burden was upon the claimant to show that the vessel was in a fit condition to transport the cargo undertaken to be carried; in short, that she was seaworthy. The *Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. This burden has not been sustained. The *Onelda* was not in a fit condition to carry her cargo to Boston, Mass., having in view all the conditions reasonably to be expected during the voyage. At the time she broke ground she had a starboard list of eight or nine degrees and within 24 hours thereafter she rolled over and took an equal list to port. This list increased until the morning of the 20th of September when she again turned to starboard with a list of 15 degrees, which was gradually increased, and at one time reached 24 degrees. This condition cannot be accounted for either by the state of the weather or the slight shifting of the cargo. The instability indicated at Charleston steadily increased as the ship continued her voyage. In the nature of the case this was inevitable and must have been known to her master at the time. The coal and water

were stowed below the center of gravity and as these were consumed the tendency to become topheavy increased. It cannot be said that a vessel is in a seaworthy condition which has at the inception of her voyage, little, if any, positive metacentric height, a list of eight or nine degrees, and her cargo weight so distributed that her instability must increase as she proceeds. Perhaps the most persuasive proof of her inability to reach her destination safely is found in the fact that the list increased so rapidly that on the morning of the 21st, when there was a starboard list of 22 degrees, her master, fearing that she would be unable to reach Boston, put into the port of New York in distress.

The subsequent disaster which overtook the Oneida can be traced directly to the improper distribution of the cargo at Charleston. The sequence of events leaves little room for doubt regarding this proposition. The faulty loading produced a list which necessarily increased as the vessel proceeded. Increasing instability made the completion of the voyage imprudent. The danger of continuing made deviation a wise precaution. In order to readjust the cargo it became necessary to open a cargo port in the lower between decks. Opening the port, followed by the sudden lurch of the ship, caused the damage to the cargo. Thus the damage can be traced directly to the initial instability. This was a fault from the consequences of which the ship is not relieved by the provisions of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]). The *Southwark*, supra, and cases cited; *The Germanic*, 124 Fed. 1, 59 C. C. A. 521; *The C. W. Elphicke*, 122 Fed. 439, 58 C. C. A. 421; *The Manitou* (D. C.) 116 Fed. 60, affirmed 127 Fed. 554, 63 C. C. A. 109.

The claimant contends that there was error in ascertaining the damages, in respect to the foreign shipments, by taking into consideration the value of the cotton at Liverpool rather than at New York where the claimant's contract of carriage ended; New York having been substituted for Boston by agreement. The claimant also insists that it was error to allow the libellant coastwise freight on the cotton from Charleston to New York and ocean freight from New York to Liverpool. The commissioner commenced his computation by fixing the value of the cotton at the amount stated in the invoice. Both parties appear to be content with this basis of computation, at least there is no exception challenging its accuracy. The bill of lading contains the following clause:

"In ascertaining the amount of such damage, the same shall be computed at the value or cost of the said goods or property at the time and place of shipment."

The parties differ as to the proper construction of this language, but not in the particular now under consideration, and we start, therefore, with the assumption that the cost or value of the cotton at the place of shipment is correctly stated. Should the ship have received credit for the value of the cotton at Liverpool or New York? Seventy-three bales of damaged domestic cotton were sold in New York for \$28.88 a bale, a very much higher price than was obtained in Liverpool. We think the contract with the Oneida simply contemplated a carriage of the goods to Boston, there to be delivered to a separate and wholly

independent carrier. When this delivery was made the obligation of the ship terminated. In other words the port of Boston was the place of destination as between those parties and there the value of the goods in their damaged condition was to be ascertained irrespective of the fact that the owners had contracted with a separate carrier to convey them to Liverpool. Especially is this true in a case where the through voyage was broken up by the refusal of the subsequent carrier to receive the goods in their damaged condition. But New York was by the request of the owners substituted for Boston and the reciprocal rights and obligations of the parties must be considered as they accrued at the former city. *Marshall v. N. Y. C. R. Co.*, 45 Barb. 205, affirmed 48 N. Y. 660. The claimant was, therefore, entitled to credit for the value of the cotton at New York unless it or its agents agreed to the contrary. It was the opinion of the surveyors that the cotton should be forwarded to Liverpool for sale. Mr. Putnam testified as follows:

"It was my opinion, based on the Liverpool market, that it was desirable to forward the cotton to Liverpool. New York is a large market for damaged cotton; it is a good market; New York and Philadelphia. Personally I know nothing about the market in Liverpool for damaged cotton. There are large quantities of damaged cotton sold in Liverpool, probably more than in New York, and it is supposed to be a better market for damaged cotton than New York. * * * When I stated to Messrs. William P. Clyde & Company that it was advisable to send the damaged cotton to Liverpool under through bills of lading they didn't object to it at all, they didn't make any effort, they tried to do it. * * * I know of no interest they had in the cotton after delivery under through bill of lading to Boston. * * * If, in point of fact, it appears that the cotton that was forwarded to Liverpool sold at very much lower rates it simply indicates an error, in my judgment, in having it go forward."

Mr. Coe, an average adjuster, testified:

"The damaged cotton was delivered to the underwriters against their guarantees, and they had the sole control and disposition of it."

The cotton went forward with the full knowledge of Clyde & Co., and it is true that they did not object, but we fail to find that they assented to the proposition that the value of the cotton was to be ascertained with reference to the Liverpool market and that the entire expense of getting it there was to be borne by them. The contention of the libellant is that the claimant's rights were entirely in the hands of the surveyors and that the claimant was remediless no matter how ill-advised their recommendations might be or how disastrous the consequences, provided they were made in good faith. "If the surveyors," says the brief, "had reported that the damaged cotton could be sold to the best advantage in Kamchatka, it would have been quite proper to send it there for sale, and the expenses of the transportation would be a charge against the proceeds of the sale." It would seem to follow as a natural conclusion from this contention that the insurers and owners were at liberty to convey the cotton from port to port until one was found where market conditions were favorable, and always at the expense of the claimant. We cannot accede to this view.

There is force in the suggestion that when the cotton was forwarded all parties expected a general average in which event the adjustment would have been made with reference to values and losses at New

York. This is evidenced, inter alia, by the indemnity agreement, dated September 27, 1897, which the underwriters gave to the Oneida. The first and third clauses are as follows:

"First: To protect, indemnify and hold harmless the said steamer Oneida, her owners, agents and all concerned therein, from and against any claim or demand that is or may be made for any damage or loss that may be claimed to have been caused by the deviation or change of route aforesaid. This agreement not to prejudice any claims which the owners, shippers or underwriters of said cotton may have by reason of occurrences prior to the date hereof. * * * Third: To pay upon demand such proportion of general average, salvage and special charges on said cotton, sound and damaged, as may be found to be due on adjustment."

In view of all the circumstances and conditions, we do not think that the mere acquiescence of the agents of the claimant in the forwarding of the cotton to Liverpool binds the claimant to the extent of charging it with the entire loss attributable to an act which is now conceded to have been a serious mistake. The cotton did not belong to claimant. Even had an objection been made there was no power to enforce it. The case presents no elements of an estoppel. The owners saw fit to send the cotton to a foreign market but this does not change the rule of damages in the absence of an agreement express or implied that such was the intention of the parties. It follows, of course, as a corollary of the foregoing that the claimant should not be charged with the ocean freight.

The failure to object to the substitution of the Liverpool market for the New York market did not operate to bind the claimant to the large outlay necessary in order to get the goods to the former market. Something more than mere silence was necessary to produce such an obligation. Not only is there no evidence that the claimant agreed that it would pay the ocean freight but on the contrary the record shows that the claimant at all times expected to be paid for the service. Clyde & Co. rendered their freight bill to Johnson & Higgins and at no time waived their right to be reimbursed for the outlay thus occasioned. The libellant relies solely on a negative acquiescence where an affirmative promise is required.

The only remaining exceptions, necessary to be considered, are those challenging the action of the commissioner in adding the coastwise freight, paid the claimant, to the invoice value, thus depriving the claimant of the freight earned in carrying the cotton from Charleston to New York. Were this an ordinary action at common law, with no express stipulations between the parties regulating the measure of damage, the ruling of the commissioner in this regard could not be sustained. The rule governing such cases is well stated as follows:

"The damage sustained by the plaintiff from the failure to perform this contract was clearly the value of the apples in New York at the time they should have been delivered, pursuant to the contract, in the condition the defendant undertook to deliver them, less the price to be paid for the service." *Sturgess v. Bissell*, 46 N. Y. 462; *Rodoconachi v. Milburn*, 18 Q. B. D. 67.

In the present case, however, the parties have seen fit to agree to compute the damage in case of loss at the value or cost of the property at the place of shipment, and there is much force in the argument that, in such circumstances, the shipper should not lose the amount paid for

freight. We are not disposed to interfere with the action of the commissioner in following a rule which has long been established in the admiralty courts. *Pearse v. Quebec S. S. Co. (D. C.)* 24 Fed. 285; *The Lydian Monarch (D. C.)* 23 Fed. 298.

It follows that the decree must be reversed, without costs in this court, and the cause remanded to the District Court with instructions to compute the damages in accordance with this opinion.

WALLACE, Circuit Judge (concurring). In concurring in the opinion of the court I deem it proper to state the reasons why, as it seems to me, the ship, and not the cargo owner, should bear the part of the loss represented by the freight upon the damaged goods from Charleston, the place of shipment, to New York, the substituted place of delivery.

The general rule is that, in case of a loss of the goods, the carrier is liable to the shipper for their market value at the point of destination, less the amount of the freight charges due for their transportation; and the same rule applies where the goods are merely damaged, and are delivered in their damaged condition, with the qualification that the value of the goods in their damaged condition is to be deducted. Presumably the cost of transportation to the place of destination is an element of the market value of the goods at that place; and when the shipper recovers their market value, or upon the basis of their market value at that place, he obtains full indemnity. As the shipper thus gets the benefit of the transportation, the carrier should not lose the freight. In the present case, however, the general rule is deflected by the peculiar condition in the bill of lading. That condition was as follows:

"It is further mutually agreed that in case any loss, detriment, or damage is done to or sustained by any of the goods or property herein receipted for during transportation, * * * in ascertaining the amount of such damage the same shall be computed at the value or cost of said goods or property at the time and place of shipment."

Obviously, this clause cannot be construed literally, as it would be preposterous to suppose that the parties intended that, in case of a partial or even a trifling damage, the loss should be estimated at the whole value or cost of the goods. In reason it must mean either that the damage recoverable shall not exceed the cost or value of the goods at the time and place of shipment, or, alternatively, that as a basis for computing the damages their cost or value at the place of shipment is to be substituted for their market value at the place of destination. The language is more consistent with the latter meaning. The clause was probably inserted for the benefit of both parties, and to relieve either from the chances of an excessive loss arising by abnormal fluctuations in the market value of the goods occurring after the time of shipment, and whereby the market value at the time of delivery might be much higher or much lower than at the time of shipment, or than ordinarily. Reading it as intended to eliminate an element of uncertainty in estimating possible loss, it can be given due effect without burdening the shipper with the cost of the transportation of the goods. Under a bill of lading like the present the shipper's loss

is fairly measured by the difference between the cost or value of the goods at the time and place of shipment and their value in their damaged condition at the place of delivery, together with the expenses incurred for their transportation. The carrier really obtains the benefit of the transportation, and the shipper does not, because, applying this rule of damages, the carrier is allowed the value of the damaged goods at their place of delivery. There is no justice in requiring the shipper to pay for a benefit which inures wholly to the carrier.

(128 Fed. 693.)

IRON CITY TOOLWORKS, Limited, v. WELISCH.

(Circuit Court of Appeals, Third Circuit. February 17, 1904.)

No. 48.

1. SALES—PATENTED ARTICLES—AGREEMENT TO MANUFACTURE—DELIVERY—DAMAGES—LOSS OF PROFITS.

In an action for breach of a contract to manufacture and deliver to plaintiff patented picks intended for sale to Alaska miners, by reason of defendant's failure to deliver the same as agreed, no element of loss of profits could be considered in the computation of damages which was uncertain, speculative, and not clearly and unqualifiedly proved.

2. SAME—EVIDENCE.

In an action to recover for breach of defendant's contract to manufacture and deliver patented picks to plaintiff, which he intended to sell to Alaska miners, evidence of anticipated profits, based on plaintiff's sale of a sample pick or picks to a miner, which had been made in a blacksmith shop, at retail, before the making of the contract, and as to his opinion concerning the market for the same had they been delivered as agreed, was inadmissible, as too remote and speculative.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Wm. R. Blair, for plaintiff in error.

Wm. B. Rodgers, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and McPHERSON, District Judge.

GRAY, Circuit Judge. In the court below, Welisch, the defendant in error, was plaintiff, and the Iron City Toolworks, Limited, the plaintiff in error, was defendant. The action was one of assumpsit, brought by plaintiff against the defendant, to recover damages alleged to have resulted from a breach of contract between the plaintiff, a citizen of the state of California, and the defendant, a partnership association existing under the laws of the state of Pennsylvania, doing business at Pittsburg in that state. The facts disclosed by the record, so far as they are pertinent to the question before us, are as follows:

The original contract between the parties was in writing, dated June 25, 1900, and therein the defendant, for the consideration mentioned, undertook to manufacture for the plaintiff one thousand pickeyes and ten thousand picks, to be shipped not later than ninety days from date to the plaintiff, in California. One hundred dollars was paid in cash, and \$2,700 deposited in escrow in a Pittsburg bank. The pick was

of a certain kind, for which the plaintiff had, in 1892, obtained letters patent. It was called an adjustable pick; that is, the arms or points of the pick are detachable from the central part, or the pickeye, into which the handle is inserted. Delivery was not made by defendant, in accordance with the contract, at the expiration of 90 days, but a sample pickeye, with points to match, was shipped to and received by the plaintiff in California. The plaintiff objected that the adjustable parts of the sample did not fit, but he kept the same in his own possession until November 25, 1900, when he visited the defendant in Pittsburg, and agreed that defendant should go on and complete the order, one half of the picks to be delivered in December, 1900, and the other half in January, 1901, neither party waiving any rights he then had. Defendant failed to furnish the picks within the time thus extended, and, on February 2, 1901, the suit was brought in the court below. The trial resulted in a verdict and judgment in favor of the plaintiff, for \$2,750. The plaintiff in error has filed here 14 assignments of error to the admission of testimony and to the charge of the court.

The main question, however, underlying them all, and with which we are here alone concerned, is, whether the plaintiff was entitled to recover as damages, alleged profits which he claimed he might have realized but for the breach of contract on the part of the defendant. Over the objection of the defendant, the plaintiff was allowed to testify, as follows:

"Q. Were picks of this kind in demand for the purpose of the Alaska mining operations? A. Yes, sir. Q. Well, was that a large demand, or not? A. Well, it is the most practical pick. Of course we don't all agree upon that point, but this new pick in comparison with the old pick is as a breach loading gun would be to a muzzle loading gun. Q. State whether there was a demand for picks of this character such as this. A. There was a demand for picks, and the better the pick the more demand for them. * * * Q. Well, Mr. Welisch, would you have been able to have sold these picks if they had been delivered in the season of 1900? A. Why, yes, sir. * * * Q. Mr. Welisch, at what profit could you have sold these goods if they had been delivered according to contract? A. I have not had a direct offer because I had nothing to deliver as far as the jobbing of it was concerned. Retail, I was offered five dollars a pick by a miner going out, that is a pick and two points. That was retail. They offered to me to take along and so save weight and time."

This testimony is somewhat indefinite, but, as plaintiff afterwards testifies that this was in San Diego, where he was then in the clothing business, and that he removed to San Francisco in May, 1900, we must assume that this was prior to that month, and therefore prior to the making of the contract in question; and further, that the pick or picks that were sold to a single miner, were of the sample picks which he testified to having had made by a local blacksmith. The plaintiff further testified that, in May, 1900, he sold out his men's furnishing and clothing business, in the city of San Diego, Cal., and removed to the city of San Francisco: that at the time of the making of the contract with the defendant, there was a great excitement over the discovery of gold in Alaska, and that 40,000 miners went to Alaska during that season, and that there was a great demand for picks. Upon this testimony of the plaintiff himself, as to what profits he believed he might have made, had the contract been fulfilled according to its terms, the learned judge of the court below charged, as follows:

"It will be for you to determine whether there was a breach of this contract, whether there was any delivery here of the subject-matter of this contract within the extended time, within the two months. If you find upon those questions in favor of the plaintiff, you will then be confronted with the question of damages. This article, the subject-matter of this written contract, was not an article upon the general market; that is to say, the plaintiff could not go into the general market and buy these picks. It was a patented article. If it had been an ordinary article of commerce, such as flour, coal, or ores, or any manufactured article in common use and common sale, the market value would be the standard to which the jury would resort in settling damages, but this article was not upon the general market, it was a patented pick, and therefore I charge you that in view of the subject-matter of this contract, and looking at all the circumstances surrounding the transaction as testified by both sides, that the measure of damages here is the actual loss the plaintiff sustained by the defendant's breach. * * * Under the evidence in this case, you will determine what the plaintiff could have sold these picks for if they had been delivered to him in accordance with the terms of his contract. You will remember that the delivery under the written contract was to take place within ninety days, not later than the 23d or 24th of September, and you will not fail to observe that if the plaintiff's version of the extension of the agreement is correct, and upon that subject the letter here speaks, his rights under the written contract were preserved, 'neither party waiving any rights he now has,' so that if the terms of the extension agreement were not complied with by the defendant, the plaintiff had a right and has a right to fall back upon any breach that occurred on the original contract, and you will ascertain from the evidence what his loss, what his actual loss, was by reason of the failure of the defendant company to furnish these picks. The law in a case of this kind seeks, as far as is humanly possible, to give compensation to one who has been aggrieved by a breach of contract, pecuniary compensation, and in accordance with that principle of law I have instructed you, and I now repeat the instruction, that the true measure of damages here, the just and legal measure of damages, is the actual loss which the plaintiff sustained by reason of the failure to deliver these picks for the purpose for which they were intended. You have the testimony of the plaintiff as to the demand and as to what he was offered for these picks, and you have in the order figures by which, it seems to me, you may arrive at the actual loss he sustained if you find in his favor."

The learned judge stated to the jury that the true measure of damages here, was the actual loss which the plaintiff sustained by reason of the failure to deliver these picks for the purpose for which they were intended. This, as a broad statement of the general rule, is quite correct. The difficult question is, what are the elements of this "actual loss," which is to be the measure of damage in a given case? or, in this case, how far are expected profits, or profits which plaintiff claims might have been realized but for the breach of contract by the defendant, such an element? No element of loss can be considered in the computation of damages, that is not clearly and unqualifiedly proved, and for this reason, the general rule, correctly stated by the learned judge in his charge, has always excluded proof of uncertain or speculative profits. So, where there is no market price for an article, damages cannot be computed upon the belief of plaintiff, or other witnesses, whether more or less probable, that the commodity contracted for, and not delivered, could have been sold for a certain price. Such evidence has not the degree of certainty required by the law, and the hardship that may in particular cases accrue to individual plaintiffs by the exclusion of such testimony, must be weighed against the greater hardship and inconvenience that would result in the administration of justice from the admission of testimony of so vague and indefi-

nite a character. An exception to the general rule, excluding expected profits as a basis for the computation of damages, or perhaps it would be better called a modification of its application, is found in cases where the failure of the defendant to deliver, has at least deprived the plaintiff of the benefit of a definite contract which he has made in reliance on the fulfillment of his contract with the defendant. The doctrine in this regard is clearly stated in *Western Union Telegraph Company v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479, as follows:

"It has been well settled since the decision in *Masterton v. The Mayor of Brooklyn*, 7 Hill, 61 [42 Am. Dec. 38], that a plaintiff may rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment. In the language of the Supreme Judicial Court of Massachusetts, in *Fox v. Harding*, 7 Cush. 516: "These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." Page 522."

In *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 205, 11 Sup. Ct. 503, 35 L. Ed. 147, Mr. Justice Lamar, in delivering the opinion of the court, says:

"The authorities both in the United States and England are agreed that, as a general rule, subject to certain well-established qualifications, the anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach; but in the application of this principle the same uniformity in the decisions does not exist. In some cases of almost exact analogy, in the facts, the adjudications of the courts in the different states are directly opposite. The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the nonfulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms."

In that case, it was decided that evidence as to the profits expected to be derived from the sale of flour, which plaintiffs would have manufactured had defendants furnished the machinery for doing so, according to contract, could not be admitted. Such losses were, in the opinion of the court, "rather remote and speculative than direct and immediate results from the breach alleged."

We think that, by the great weight of authority, the testimony as to what profits the plaintiff might have made by the sale of these picks, had they been delivered according to their contract, should be excluded as too remote and uncertain to form the basis of a finding of damages. And this too, even if the testimony as to such anticipated profits had been more certain and precise than it was. As it is, the evidence is wholly confined to the testimony of the plaintiff himself, who testifies merely as to his opinion and belief, stating no fact except the one so vaguely testified to, of his sale of a sample pick or picks to a miner, prior to the making of the contract. As plaintiff himself says, this

was a retail, and not a jobbing, sale, and it would be manifestly unjust to make it the criterion of the price the plaintiff would have received for the whole number of picks contracted for, had they been delivered. What the cost and expense to the plaintiff would be, in making the sale of these picks, is not alluded to. No facts are adduced in support of plaintiff's opinion. It is hard to imagine a case where profits could be more justly characterized as speculative and uncertain.

We are of opinion that the learned judge in the court below erred in submitting to the jury, as a basis for their computation of damage, the question of what profits the plaintiff might have gained by the sale of the picks, had they been delivered to him by defendant, according to contract.

For this reason, the judgment below must be reversed, and a venire de novo awarded.

(128 Fed. 697.)

ARK FOO et al. v. UNITED STATES. HOO FONG et al. v. SAME. JUNG MAN v. SAME.

(Circuit Court of Appeals, Second Circuit. February 23, 1904.)

Nos. 86, 87, 119.

1. CHINESE—EXCLUSION—FINDINGS—REVIEW.

Where a commissioner's determination rejecting the evidence of citizenship in a proceeding for the deportation of a Chinese alien on the ground that he did not believe the testimony that the defendant was only 29 years of age was affirmed by the district judge, and there is nothing in the record to show that the commissioner's conclusion as to defendant's age was incorrect, the ruling will be affirmed.

2. SAME.

Where a witness to the citizenship of a Chinese alien testified that defendant was born in the United States, but was unable to state any facts concerning the village where it was alleged defendant was born, and where the witness testified he lived for 18 years—the only event which he recalled with certainty being defendant's birth—and, in answer to a question as to his business, stated that he did "odd jobs and loaf," a finding of the commissioner rejecting his testimony, affirmed by the district judge, will be affirmed on appeal.

3. SAME—OFFER TO BE SWORN.

Where a witness to the citizenship of an alleged Chinese alien was not impeached or discredited, but was clear and straightforward, and no criticism was made with regard to the same by the commissioner, and the alleged alien was not requested to be sworn in his own behalf, his failure to offer himself as a witness was not a sufficient reason for ordering him deported.

Lacombe, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of New York.

These are appeals from decisions of the District Judge of the Northern District of New York, affirming orders of United States commissioners adjudging that the appellants are Chinese laborers unlawfully

¶ 1. Citizenship of Chinese see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

within the United States and ordering their deportation to the Empire of China. The appeals were argued together.

R. M. Moore, for appellants.

Taylor L. Arms, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. In the case of Ark Foo and Ark Toy the commissioner states his reason for rejecting the evidence of citizenship offered in their behalf as follows:

"The two defendants were in court and the witness swears that the defendant Ark Foo is twenty-nine years of age. I was satisfied from said defendant's appearance that he was certainly over forty years of age and therefore placed no reliance in the witness' story."

The district judge held that the commissioner's determination in this regard should not be disturbed on appeal. We concur in this ruling. There is nothing in the record to show that the conclusion as to Ark Foo's age was incorrect. At the argument a photograph of Ark Foo purporting to have been taken in December, 1903, was handed to the court. Even though we were permitted to consider this photograph it proves nothing that enables us to say that the commissioner was wrong in his conclusion that Ark Foo is over 40 years of age. To the commissioner is delegated the duty to determine, in the first instance, these questions of fact, and if it were perfectly apparent to him, as he says it was, that the appellants' witness had falsely stated the age of one of them the commissioner was justified in rejecting the entire testimony.

In the case of Hoo Fong and Lee Cheong Ging the commissioner declined to give weight to the testimony of the appellants' witness, called to establish their citizenship in the United States, because he was utterly unable to state any facts concerning the village of Martinez where it is alleged the appellants were born and where the witness testified he lived for 18 years. The only events which he recalled with certainty during this long period were the births of the appellants. In answer to the question, "What is your business?" he answered, "Do odd jobs and loaf." He was evidently a worthless individual and because of the inherently improbable nature of his story the commissioner disregarded his testimony. The district judge agreed with the commissioner and we are convinced that this court should not disturb these findings.

In the case of Jung Man an entirely different proposition is presented. A witness was called who established without contradiction the citizenship of the appellant. The witness was not impeached and there was nothing in his testimony to discredit it. It was a clear, straightforward statement. The commissioner makes no criticism of the testimony or of the witness. He does not suggest that the testimony is unsatisfactory or contradictory, or that there was any point requiring explanation. Neither he nor the district attorney requested the appellant to be sworn, as was done in *Ex parte Sing* (C. C.) 82 Fed. 22, and in the recent case of *United States v. Leung Shue* (D. C.) 126 Fed. 423. There can, therefore, be no escape from the conclusion

that the commissioner would have accepted the appellant's testimony and would have ordered his discharge were it not for the fact that he failed to take the witness stand. The logical deduction from this ruling, stated bluntly, is that after a Chinese person has proved himself a citizen and entitled to remain in the United States, the commissioner may conclude that he is not a citizen and that he must be deported simply because he was not sworn as a witness; and this, too, in a case where no one requested him to be sworn and where he could have no personal knowledge of the facts in controversy. We are confronted with the naked question, where a Chinese person seeks to enter the United States on the ground that he is an American citizen, and has established his citizenship by unimpeached testimony, does his failure to be sworn constitute a sufficient reason for ordering his deportation? It is difficult to understand upon what theory the affirmative of this proposition can be maintained. Of course, numberless cases have arisen, and may arise in the future, where the failure of the defendant to testify may throw suspicion of the gravest character upon his defense as where, for instance, his own declarations that he was born in China are placed in evidence against him. But the case at bar is not embarrassed by any complications of this character. The crucial question was whether or not the appellant was born in the United States. From the very nature of the issue he could have no positive knowledge upon this point. Necessarily his testimony must have been hearsay. The record shows that he was born in Albany, Or., twenty-six years ago and that he left the United States and returned to China when he was 13 years of age. It is, therefore, quite apparent that he could have given no evidence which would have thrown any light upon the time and place of his birth, and yet the fact that he stood mute is the sole reason for his deportation. Indeed, the district attorney quotes with approval the language of a reported case to the effect that the claim of a Chinese person that he is entitled to citizenship "must be substantiated by better testimony respecting his birth in the United States than that of himself, based solely upon what his parents told him and the hearsay testimony of other witnesses." The commissioner suggests that a boy of 13 would be able to state "innumerable things with reference to his life in this country, the house and village where he lived and his voyage back to China, which would materially assist the court in arriving at the truth." Just what these things are is not apparent, especially when it appears that Albany is a "small town with no names or numbers to the streets." As to the voyage it was in all probability as eventless as those taken by others of appellant's countrymen. It is undoubtedly true that a shrewd cross-examiner might have involved appellant in contradictions upon these collateral matters, but we see no reason why he should voluntarily subject himself to such an ordeal. If the rule contended for be sustained the defendants, in cases like the one at bar, will find themselves confronted by a dilemma which impales them upon one horn or the other. Whether they testify or fail to testify the result is the same—deportation. In *United States v. Leung Shue*, *supra*, the case was stronger for the government, in one respect at least, than the case in hand, for the reason that the district attorney requested the defendants to take the

stand in their own behalf which, by the advice of counsel, they refused to do. The judge there clearly states the rule as we understand it to be. He says:

"They [the defendants] have proved their case by a credible and credited witness, and there is neither law nor reason for requiring defendants to take the stand and submit to examination in such a case upon pain of deportation."

See, also, *United States v. Hung Chang* (D. C.) 126 Fed. 400, 405.

We think the commissioner should have discharged the appellant.

It follows that the decision in the case of *Ark Foo and Ark Toy* and in the case of *Hoo Fong and Lee Cheong Ging* must be affirmed.

In the case of *Jung Man* the decision is reversed and the case is remanded to the District Court with instructions to discharge the defendant.

LACOMBE, Circuit Judge (dissenting). In the first two causes I concur in the result, but dissent from the methods by which conclusion is reached, and in the third cause dissent in toto. In each of these causes the majority of this court has examined, discussed, and analyzed the testimony given before the commissioner, and has reached a conclusion in accordance with its own impressions as to the credibility of the witnesses. I do not understand that this court has any such function to discharge. Certainly, without any opportunity to see the witness and the defendant, or to observe in what way the testimony is given, it would be very ill equipped to discharge such function. In *Chin Bak Kan v. U. S.*, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, the Chinese person had set up a claim of citizenship, and a hearing at which witnesses were examined was had before a United States commissioner. That officer held that the Chinese person had "not made it appear to me [the commissioner] that he was a subject or citizen of any other country than China," and adjudged that he be removed from the United States. Appeal was taken to the judge of the District Court, who affirmed the judgment, and, the construction of a treaty being involved, appeal was taken direct to the Supreme Court. After indicating that it had power to dispose of the entire case, that court says:

"But as the jurisdiction of the commissioner is sustained, we are of opinion that we cannot properly re-examine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is a fortiori justified. The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respects to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that, where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated hearings on the facts."

The three causes were heard, each before a different commissioner. In each, one witness only was called—a Chinese person, who in each case testified that he was the uncle of the defendant. In each case the defendant, who was charged with being unlawfully within the United States, was informed of the charge against him, and was advised that he would be permitted to make a statement with or without oath, or to refuse to make any statement or to answer any question

put to him, and was entitled to a reasonable time to send for and advise with counsel, and to procure the attendance of witnesses. The result in each case was a failure to satisfy the commissioner by satisfactory proof that he was entitled to remain in the country, and the District Court affirmed the commissioner's decision. In the case of Jung Man the majority of the court seems to have reached the conclusion that the citizenship of the defendant was established by the witness he called, and that the commissioner arbitrarily decided against him, and rejected the "clear, straightforward statement" of his witness, not because he disbelieved it, but because defendant did not himself testify. I do not so read the record. The commissioner expressly finds that defendant "has not made it appear to me that he was a subject or a citizen of some other country than China," and the district judge says, "This court is not satisfied that the statement of the defendant's witness is true, and hence the defendant failed to sustain his contention." The "clear, straightforward statement" of the alleged uncle is extremely meager. He had not seen the defendant for 10 years. When he last saw him (in China), defendant was only 16 years old. How the witness was able to identify the boy of 16 in the man of 26—whether by his general appearance, by any distinguishing marks, by any conversations about past events, or in any other way—he wholly failed to indicate. If the decisions of the commissioners who see and hear the witnesses are to be reversed by this court on the theory that such attenuated evidence, when uncontradicted, is convincing, the attempted enforcement of the Chinese exclusion laws seems likely to become a farce.

(128 Fed. 701.)

**LANSING BOILER & ENGINE WORKS v. JOSEPH T. RYERSON & SON
et al.**

(Circuit Court of Appeals, Sixth Circuit. February 18, 1904.)

No. 1,252.

1. BANKRUPTCY—FRAUDULENT CONVEYANCES—INTENT.

Bankr. Act, § 3, subsec. 1 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), makes the execution of those conveyances which by the common law and the statute of Elizabeth were held void, as tending to hinder, delay, or defraud creditors, a ground for adjudicating the grantor a bankrupt; and subsection 3 relieves such grantor from the consequences of subsection 1 if he can prove that at the date of filing the petition he was solvent. *Held*, that the test as to whether a conveyance by an alleged bankrupt was fraudulent, within subsection 1, is the bona fides of the transfer, and hence it was error for the court to assume that, because a mortgage executed by the alleged bankrupt covered the whole of its property, it was necessarily within such section, and to refuse to admit evidence of the good faith of the transfer.

2. SAME—STATUTES—CONSTRUCTION.

Bankr. Act, § 3, subsec. 2 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), provides that the transfer by a debtor, while insolvent, of any portion of his property to some of his creditors, with intent to prefer them over others, shall constitute an act of bankruptcy; and the term "insolvency" is defined by section 1, cl. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419] as the condition of a person whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall

not, at a fair valuation, be sufficient in amount to pay his debts. *Held*, that the "property conveyed," as used in such provisions, in so far as it related to a mortgage of a corporation's entire property, did not include the mortgagor's remaining estate, where, as in Michigan, the mortgage does not transfer the title, but creates a lien only, and hence, where such estate was greater in value than the mortgagor's unsecured debts, the execution of the mortgage did not constitute an act of bankruptcy.

Appeal from the District Court of the United States for the Eastern District of Michigan, in Bankruptcy.

Certain creditors of the Lansing Boiler & Engine Works, a Michigan corporation engaged in manufacturing and mercantile pursuits at Lansing, in that state, filed their petition in the District Court about May 1, 1903, praying that, for causes set forth in the petition, the said corporation should be adjudged bankrupt. The petition alleged the present insolvency of the corporation, and that it had committed certain acts of bankruptcy, as follows: (1) In that on January 10, 1903, it conveyed to a trustee, for the benefit of some, but not all, of its creditors, all its property, with intent to hinder and delay its creditors, and that the trustee had accepted the trust and taken possession of the property. (2) In that on the day last mentioned it executed to the same trustee, for the benefit of the same creditors, a mortgage of all its real and personal property, intending thereby to hinder and delay its creditors. (3) In that it executed such a mortgage as is above stated, intending thereby to hinder and delay its other creditors, of which the petitioners are a part. (4) "In that it did heretofore, to wit, on various dates since that time, pay divers and sundry other creditors, while insolvent, intending by so doing to prefer such creditors so paid over the other creditors." (5) "In that it did, while insolvent, transfer various and sundry portions of its property to certain of its creditors, intending to prefer such creditors over other creditors." The respondent appeared and answered the petition, denying each and all the alleged acts of bankruptcy, and denying that it then was, or at any time had been, insolvent. The issues were tried before the court, no jury having been demanded. Upon the evidence submitted, the court adjudged the respondent, the Lansing Boiler & Engine Works, bankrupt. From this adjudication, respondent appealed.

Thomas, Cummins & Nichols and Russell Ostrander (Clark, Jones & Bryant, of counsel), for appellant.

Bowen, Douglas, Whiting & Murfin, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

Having made the foregoing statement of the case, SEVERENS, Circuit Judge, delivered the opinion of the court.

Although the acts of bankruptcy alleged in the petition were technically several, it is quite clear from the record that the ground relied upon consisted in the giving by the corporation on January 10, 1903, a mortgage of all its property to a trustee for the benefit of a part of its then existing creditors, with intent, as is alleged, to hinder and delay its creditors, and the further ground that at the date of the transaction the corporation was insolvent, and that it was intended thereby to prefer some of its creditors. The evidence submitted to the court on the hearing showed that at the date alleged, January 10, 1903, the respondent gave a mortgage of all its property to a trustee to secure the payment of certain portions of its indebtedness, amounting to about \$27,000. The petitioners were not among those thus secured. The respondent defended upon the grounds that, at the time the mortgage was given, its property, at a fair valuation, was worth \$70,000 or more, and that all its debts, including those named, did not amount to more than \$35,000; that the giving of the mortgage was

without any fraudulent intent, and was for the purpose of securing bona fide indebtedness; and that it was not insolvent either at the time the mortgage was given, or at the time the petition was filed. And the respondent tendered evidence tending, as was claimed, to support these several propositions. The court, however, was of opinion that, inasmuch as the mortgage covered all the property of the respondent, it could not but be that the creditors not secured were hindered and delayed thereby, and that the mortgagor must have known and intended that consequence, and refused to admit evidence to show that the mortgagor did not intend to hinder, delay, or defraud its creditors by the giving of said mortgage. Touching the charge of having given preference while it was insolvent, the court held that, in estimating the fair valuation of the assets of the respondent, only such property as was not covered by the mortgage should be taken into account; and, it not being claimed that there was property of that description, the court refused to admit evidence offered to prove that the fair valuation of the property mortgaged was as much as \$70,000.

We think the court erred in its view of the law in regard to these questions.

As to the first, it is to be observed that subsection 1 of section 3 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) makes those conveyances which by the common law and the statute of Elizabeth were held void, because fraudulent, a ground for adjudicating the grantor a bankrupt. No question of solvency or insolvency or of preference arises under this subsection, except as they bear upon the issue of good faith in making the conveyance, saying nothing now of the provisions of subsection 3 of section 3, which relieves the consequences of subsection 1, if the respondent can prove that at the date of filing the petition he was solvent. The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens v. Shiffler* (D. C.) 112 Fed. 505. And so construed, the test of the conveyances intended by subsection 1 of section 3 is that of the bona fides of the transfer. *Loveland's Bank*. (2d Ed.) § 51. For it is the well-settled law that a conveyance made in good faith, whether for an antecedent or present consideration, is not forbidden by such statutes, notwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor. This is the law in Michigan. *Hill v. Bowman*, 35 Mich. 191; *Jordan v. White*, 38 Mich. 253; *Olmstead v. Mattison*, 45 Mich. 617, 8 N. W. 555; *Oliver & Roberts Wire Co. v. Wheeler*, 106 Mich. 408, 64 N. W. 195. We think, therefore, that the court erred in assuming that, because the mortgage covered the whole property of the debtor, it necessarily followed that a case was made out under said subsection 1, and that no proof of good faith could prevail against that assumption. Upon the vital question of the bona fides of the mortgage, it was of importance to consider, among other things, what was the value of the property mortgaged, when compared with the indebted-

ness of the company. Moreover, the testimony of those conducting the transaction was admissible to prove its actual good faith. In the end, when all the available light had been shed upon it, the court would be in a situation to judge whether the transaction was prompted by a fraudulent motive or a legitimate one.

If it was found that the mortgage was given with a fraudulent motive, and so within said subsection 1, a further question would arise under subsection 3 of section 3—whether or not the respondent was solvent at the time of the filing of the petition. As the ground of that defense, and the considerations applicable thereto, are of the same nature as those inherent in the next following topic, we will postpone it to that place.

The second subsection of section 3 defines as an act of bankruptcy the transfer by the debtor, while insolvent, of any portion of his property to some of his creditors, with intent to prefer them over the others. We assume that in the present instance there was an intent to give a preference to the beneficiaries of the mortgage. However, such preference is not forbidden unless made while the debtor is insolvent. The term "insolvency" is thus defined in clause 15 in section 1 of the act:

"Cl. 15. A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419].

In determining the question of the insolvency of the debtor, the District Judge was of opinion that the language of said clause 15, excluding from the estimate any property which the debtor may have transferred with intent to defraud his creditors, would prevent the consideration of any part of the value of the mortgaged property as the assets of the debtor in the reckoning. It was contended for the respondent that the continuing interest of the respondent in its property should be considered as having remained in the corporation, and that, as that amounted to \$43,000, and the unsecured creditors had claims amounting to only \$8,000, or, putting it in another way, that as the value of the assets was \$70,000, and the total indebtedness, secured and unsecured, was \$35,000, there was no ground for the allegation that the company was insolvent when it gave the preference, or at the date of filing the petition. Holding to his view as above expressed, the District Judge refused to go into the inquiry in respect to the value of the company's property, or to consider its value subject to the mortgage. The correctness of this ruling depends upon the construction to be given to the words in said clause 15 of section 1, "exclusive of any property which he may have conveyed," etc., with intent to defraud his creditors. Of course, if it be found that the mortgage was given bona fide, no question of this sort will arise. But assuming that issue to be found otherwise, the question of construction above stated arises.

By the law of Michigan, a mortgage, whether of real or personal property, does not convey the title, but imposes a lien only for the

amount secured. *Lucking v. Wesson*, 25 Mich. 443, 445; *People v. Bristol*, 35 Mich. 28, 32. And the estate of the mortgagor is a valuable asset, at least for the amount of the excess, even if the debt should not be otherwise paid. The mortgagor's estate may be taken on execution issued on a judgment against him, or it may be sold by him in the ordinary course of business at private sale, and produce its value. This estate is not transferred by the mortgage. How the case might be if the conveyance was of the whole legal estate, we are not called upon to determine. It might be that such a conveyance would be an impediment or hindrance to the trustee in the execution of his trust which the debtor could not be allowed to interpose. But here, in respect to the excess, the trustee is not obstructed. We think that the taint of mala fides intended by clause 15 of section 1 extends only to that which is conveyed, or purports to be conveyed, and not to an interest or estate which it does not pretend to convey. *Loveland's Bank*. (2d Ed.) p. 156. And, on general principles, if we discard the old test of insolvency, it seems absurd to say that a man is insolvent because he has transferred some of his estate with intent to defraud his creditors, when he has an estate remaining which is abundantly sufficient to pay all his debts, and open to seizure for the satisfaction thereof, or which he has an absolute right to dispose of and liquidate in cash.

In *Vaccaro v. Security Bank*, 103 Fed. 436, 43 C. C. A. 279, this court, in holding that a partnership could not be held insolvent so long as any of its members were solvent (that is to say, so long as any such member had sufficient property, after his private debts were paid therefrom, to pay the creditors of the firm), held, in effect, that assets charged with a prior lien should be credited to the debtor, to the extent of the surplus, in determining his solvency. As the debts of an individual partner are a paramount charge upon his private estate, and the partner's estate would come to the trustee burdened therewith, such conditions would very much resemble the essential facts we have in the present instance, and there is no difference in any material fact which would remove this case from the operation of the principle thus recognized. Our conclusion would seem to be in accord with the motive of Congress in prescribing the new definition of insolvency.

If what the respondent offered to prove is the fact, it had enough, after satisfying the mortgage lien in full, to pay these other creditors several times over. It cannot be doubted that this equity of redemption, if we call it such (though it is not a very accurate expression as applied to these conditions), or the surplus interest or estate of the mortgagor, is an asset in the hands of the trustee, and there is no impediment to his appropriating it. We are therefore of opinion that the court was mistaken in thinking it could not take into account the value of the estate not conveyed by the mortgage, in determining the value of the assets of the respondent, in order to compare them with its debts.

The order appealed from will therefore be reversed, with directions to take further proceedings upon the footing of the petition not inconsistent with this opinion.

(129 Fed. 824.)

ROBINSON v. PITTSBURG COAL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1904.)

No. 1,261.

1. MASTER AND SERVANT—INJURIES TO SERVANT—CAUSE OF INJURY—QUESTION FOR JURY.

In an action for injuries to a seaman by the breaking of a mast, caused by its being struck by a bucket of ore negligently swung from the hold by stevedores engaged in unloading a vessel, whether it was the erratic movement of the bucket which caused the accident, or whether the derrick engineer was negligent in attempting to swing the bucket from the hatch to the dock while such movement was going on, was for the jury.

2. SAME—FELLOW SERVANTS.

Where a seaman was injured by the falling of a mast, caused by its being struck by a bucket of ore being hoisted from the hold by a derrick engineer employed by a different master from the owner of the vessel, the seaman and the derrick engineer were not fellow servants.

3. SAME—PROXIMATE CONCURRING CAUSE.

Where a seaman was killed by the falling of a mast after it was struck by a bucket of ore negligently hoisted from the hold of the vessel by an engineer employed by another master to unload the vessel, in the absence of proof that the mast was not sufficiently strong to stand all the uses for which it was designed, and, if it had been entirely sound, it would have sustained, without breaking, the strain put upon it by the blow from the loaded bucket, the fact that the mast had become decayed was not a proximate cause of the accident.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Paul Howland and Charles F. Lang, for plaintiff in error.

Squire, Sanders & Dempsey, for defendant in error Pittsburg Coal Co.

H. H. McKeehan (Hoyt, Dustin & Kelley, of counsel), for defendant in error Pittsburg Steamship Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action to recover damages for the death of James Kerr, an employé of the Pittsburg Steamship Company, by the wrongful acts of that company and the Pittsburg Coal Company. Kerr was employed as a watchman on the steamer Bartlett, and was killed while the boat was being unloaded by the Pittsburg Coal Company at its docks in Cleveland, July 1, 1901. The Bartlett was a whaleback steamer loaded with iron ore. At the time of the accident, Kerr was at the capstan on the forward turret, trying to heave the vessel closer to the dock. The boat was being unloaded by revolving derricks located on and operated from the dock. Next the turret was the foremast, and just aft of it hatch No. 1. A heavy bucket of iron ore, lifted out of this hatch and swung forward and toward the dock, struck the lamp guy of the foremast. The strain broke off the mast

¶ 2. See Master and Servant, vol. 34, Cent. Dig. § 485.

seven or eight feet from the top, just below an iron collar or band to which the lamp guys were attached. The falling piece struck and killed Kerr. An inspection of the piece showed the mast was rotten where it broke.

It was claimed that the steamship company was negligent in sending Kerr into a dangerous place without warning him, in permitting the rotten mast to be in and on the steamship, in causing the steamship to be heaved closer to the dock while the unloading operations were in progress, and in causing the unloading to be begun and continued without removing the foremast.

The coal company was charged with negligence in permitting the bucket to come into forcible contact with the lamp guys, thus breaking off the masthead, in continuing the unloading operations while the vessel was being moved closer to the dock, in continuing the unloading operations without adjusting the unloading machinery to fit the altered situation of the vessel when brought closer to the dock, and in permitting all five of the unloading derricks to be operated at the same time. The court arrested the testimony from the jury, and directed a verdict for each of the defendants.

1. The Bartlett landed at the dock in the morning. She was moored eight to ten feet from the dock, not being able to get nearer on account of her draught. While she was in this position, the coal company began to unload. The unloading began about 10:30 or 11 o'clock, and stopped at 12 for dinner. Work was resumed at 1 o'clock. During the forenoon, while the unloading was going on, the boat was hove in nearer the dock "two or three times, probably four times." At this time she was in charge of the mate, Moser. She was hove in by order of the foreman of the dock, Weddow, who said to Moser as soon as the boat was tied up, "Get her alongside of the dock as quick as you can." Altogether she was hove in about two feet in the morning, so that, when the men quit work at noon, she was six or eight feet from the dock. After the mate had had his dinner, he heard the buckets and machines going again, and he went on deck and ordered the deceased, Kerr, to go forward and heave the boat in, if he could, with the steam capstan. Kerr proceeded to execute the order. What then occurred was thus described by the mate:

"A. Kerr went up on the forward turret, and took the turns of the line off the timberheads, where the line was made fast to the dock; and he gave it the steam in order to heave her in, but I didn't see him heave her in. I didn't see that the capstan moved. So I said, 'did you get any, Jim?' and he says, 'I got a little;' and that moment I saw a bucket coming toward the spar and strike the lamp guy, and the topmast came down and fell on Kerr, and he dropped down, and I jumped on the forward turret"—

The foremast was of pine, about 35 feet long, 10 inches in diameter at the butt, and tapering toward the top. It was fastened to the deck by two pieces of iron, and was held in place by three wire stays; one running forward, and the other two to each side of the vessel. The stay nearest the dock was removed. The mast stood on a line running through the center of the hatch, about a foot and

a half forward of it and next the turret. About 7 or 8 feet from the top of the mast there was an iron collar or band, resting on a shoulder cut into the mast. From this collar, two iron arms extended out and forward, to which were attached two lamp guys (wire ropes three-eighths of an inch in diameter), which ran parallel with the mast, to the turret where they were fastened. The mast was used to carry the ship's lights, and the lamp guys to raise the lights. The lamp guys were about 14 inches apart and extended about 3 inches beyond the side lines of the mast. They were in front of the mast, probably a foot from it. The iron bucket was about 3 feet square, and, when filled with iron ore, weighed nearly a ton. It struck the lamp guys midway between the turret and the iron collar. The mast broke just below the collar. It was rotten there an inch deep all around.

Just before the accident the mate was standing a little behind the hatch out of which the bucket was hoisted, and on the dock side, 15 or 20 feet from Kerr. Asked whether the vessel was drawn in after dinner, he said:

"It was so little that I couldn't see, and that caused me to ask Kerr if he got any slack on the line at all. He said, 'Yes, a little.'"

Asked where the bucket was when he first saw it, he said:

"A. When it struck the guy—when it came swinging in towards the guy." The Court: How you mean 'swinging in?' A. Out from the dock towards the center of the vessel."

Examined further upon the same point, he said:

"A. I saw the bucket swinging towards the mast. So it must have come this way. The Court: Where was it when you saw it? A. It was right in range of my view between me, and swinging in towards the mast. * * * Q. And when you saw it, was when it was swinging around in a circle towards the dock, when it caught the mast? A. It swung towards the mast. It didn't swing in a regular circle. Q. It swung towards the mast? A. Yes, sir. Q. When was that? A. When I first saw it. Q. And when was it that you first saw it? A. When it was about two or three feet away from the guy, swinging towards the mast. I can't tell you the exact time."

O'Boyle, the engineer who operated the derrick at hatch No. 1, testified that after dinner he swung an empty bucket from the dock, and lowered it into the hatch. He did this slowly. The bucket cleared the lamp guy 2 or 3 feet. He waited 10 or 15 minutes, and then raised and swung the loaded bucket, which struck the lamp guy and broke the mast. Asked to describe the motion of this bucket, he said:

"A. The bucket came up good and straight, but the momentum of the bucket was what caught him. I couldn't see the man, where he was, at all. It was the momentum of the bucket which caught the lamp guys. The Court: What do you mean by that? You say the bucket came up straight. A. Yes, sir. Q. Now you say the momentum of the bucket. Do you mean it swung out? A. Yes, sir; and I couldn't stop it. Q. When you turned the boom, the bucket swung out? A. Yes, sir. Q. How much did it swing from being in an upright position? A. About 3 or 4 feet."

On cross-examination the witness was asked:

"Q. I want to know if you did not say to Mr. Howland, there, that, after that bucket came up out of the hatch and started back for the dock, it was swinging back and forth? A. Well, a bucket naturally would swing back

and forth. Q. Did you say that to him? A. Yes, sir; I did. Q. And the bucket was swinging back and forth, you said, through the air, about 3 or 4 feet, didn't you? A. Yes, sir."

The witness, on cross-examination, testified that in the morning the boom was lower down, in order to reach out farther over the vessel. It does not appear when he raised the boom. He says he did not during the forenoon, and he evidently did not after dinner. It was his opinion the boat was moved in during the noon hour, but he did not see it. When he swung the empty bucket out to the hatch after dinner, he says it cleared the mast about two or three feet. He moved that bucket "slow."

This was substantially all the testimony with respect to the accident itself. There was some additional with respect to the rotten mast.

2. The court below, after holding that the rotten mast was not connected with the accident in a way to render the steamship company liable on that account (a ruling which we sustain), assumed that the occasion of the accident was "the bringing nearer together of the vessel and the machinery for unloading it," and, asserting that the deceased did this, and failed to notify either the mate of the vessel or the agent of the coal company of the extent of the movement of the vessel nearer the dock, held that neither the steamship company nor the coal company was liable under the circumstances.

We have examined the testimony carefully, and are at a loss to comprehend how the court below reached the conclusion that the only reasonable inference to be drawn from the testimony is that the vessel was hove in two feet nearer the dock during the noon hour, when the deceased tried to work the capstan, and that this was the cause of the accident. Instead of establishing these facts, there was proof which, in our opinion, tended to show that there was no movement of the vessel during the noon hour, when the deceased tried to operate the capstan, and that the cause of the accident was not the movement of the boat, but of the bucket. It was not the dock hands, but the sailormen, who hove in the boat. They were in command of the mate, and acted under his orders. The mate had been directed by the foreman of the dock hands to get the boat along side of the dock as quick as he could. He therefore was the one of all others who was in the best position to state when the boat was hove in. He testified she was hove in probably four times during the morning—in all, 2 feet. He directed Kerr to try and heave her in further after dinner, and Kerr tried to do this with the steam capstan. He was only 15 or 20 feet away from Kerr, and watching him closely, when he tried to work the capstan, yet he could not see any movement at all. That is why he asked Kerr whether he got any slack, and Kerr said, "A little." He might have got a little by the stretching of the line. The tendency of this testimony is to show that, in point of fact, Kerr did not move the vessel at all. If he had moved the boat but a few inches, the mate, watching closely the working of the capstan, would instantly have observed the movement.

Not only does the testimony fail to show with any degree of certainty that the boat was hove in by the deceased a distance sufficient to cause the bucket, in its regular course, to catch the lamp guy,

thus causing the accident, but it tends to show that the reason the bucket struck the lamp guy was because of its erratic movement, occasioned by the improper and negligent operation of the derrick by O'Boyle, the engineer on the dock. The mate and O'Boyle were the two persons who had opportunity to observe the motion of the bucket when it struck the lamp guy. They both testified that at the time the bucket was not swinging around on its regular circle from the hatch towards the dock, but out from the dock towards the mast—in other words, back and forth, or to and fro, across the line of its usual circular course. The mate was in a position—on the dock side of the vessel, just aft of the hatch—where he would notice such a divergence of the bucket from its regular course. He says the bucket "came swinging towards the guy"; "swinging out towards the mast"; "it swung towards the mast"; "it didn't swing a regular circle." The derrick engineer says the bucket came up good and straight, but "it was the momentum that caught him," and, asked to explain what he meant by the momentum, said the bucket "swung out," and he could not stop it; that "it swung out about 3 or 4 feet." On cross-examination he admitted that he had stated that the bucket "was swinging back and forth about 3 or 4 feet."

The engineer testified that, when the empty bucket was swinging slowly from the dock to the hatch, it missed the mast and the lamp guys by only two or three feet. He had the means, therefore, of knowing that the loaded bucket, swinging back and forth, across the line of its course and towards the mast, a distance of about three or four feet, as he put it, was liable to hit the mast or the lamp guys if swung around while that erratic movement continued.

One of the claims of the petition is that the coal company was negligent in permitting the loaded bucket to strike the lamp guys, and thus break the mast. In view of the testimony to which we have called attention, we think it was clearly a question for the jury to determine whether it was the erratic movement of the bucket which caused the accident, and whether the coal company, through its employé, the derrick engineer, was negligent in attempting to swing the bucket from the hatch to the dock while this movement was going on. *Dunlap v. N. E. R. R.*, 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058; *R. R. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Richmond & Danville R. R. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Gardner v. Mich. Cen. R. R.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107. The deceased was not, in the view we take of the case, a fellow servant of the derrick engineer, nor did he assume the risk of being injured by the negligence of servants of the coal company engaged in unloading the vessel.

3. While unable to agree with the court below that there was no proof presented to sustain a verdict in favor of the coal company, we approve of its action in directing a verdict for the steamship company. The claim against the latter turned upon the part played in the accident by the rotten mast. There was no testimony tending to show that the mast was not strong enough to stand all the uses for which it was designed and employed, namely, the carrying of lights and signals, and no testimony tending to show that the mast, if en-

tirely sound, would have sustained, without breaking, the strain put upon it by the blow of the loaded bucket when it struck the lamp guy. The steamship company could not be held liable for failing to guard against an accident which it had no reason to anticipate, either by providing a stronger mast, or by warning the deceased not to stand near the mast while the derrick was being operated.

The judgment of the court below is affirmed as to the Pittsburgh Steamship Company, but reversed as to the Pittsburgh Coal Company, and the case remanded for a new trial.

(129 Fed. 329.)

THREE PACKAGES OF DISTILLED SPIRITS v. UNITED STATES ex rel. WESTHUS, Collector of Internal Revenue.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1904.)

No. 1,988.

1. INTERNAL REVENUE—LIQUOR PACKAGES—CHANGING CONTENTS AFTER STAMPING—FORFEITURES—EVIDENCE.

Where, on an information to forfeit certain liquors on the ground that distilled spirits of a different quality had been put into the barrels after they were originally stamped and branded, in violation of Rev. St. § 3455 [U. S. Comp. St. 1901, p. 2279], it was conceded that the claimant was entitled to reduce the proof by the addition of water, and the uncontradicted evidence showed that the spirits contained in the packages had been reduced in proof between 12 and 14 degrees, after they had been gauged and stamped, by the addition of water. In conformity with the law and in the presence of a government gauger, the discrepancy in the percentage of the alcohol contained in the liquor was insufficient to form a basis for an inference that the change was occasioned by the addition of "other spirits of a different quality."

2. SAME—ISSUES—PROOF.

Where an information for the forfeiture of certain packages of liquors alleged that, after the barrels had been inspected, gauged, and stamped, something else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked, to wit, distilled spirits of a different quality, had been placed therein, in violation of Rev. St. § 3455 [U. S. Comp. St. 1901, p. 2279], evidence that at the time the proof of the liquors was reduced by the addition of water, after the packages had been stamped, some caramel coloring matter had been put into the packages to deepen the color, was not within the information, and therefore inadmissible.

In Error to the District Court of the United States for the Eastern District of Missouri.

For opinion below, see 125 Fed. 52.

Warwick M. Hough (Jacob Klein, on the brief), for plaintiff in error.

David P. Dyer (Horace L. Dyer and Bert D. Nortoni, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge. This is an information which was filed by the United States against three packages of distilled spirits to obtain a forfeiture of the same under section 3455 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2279]. The A.

Graf Distilling Company claimed the liquor and interposed a defense against the forfeiture. Section 3455 of the Revised Statutes of the United States, quoting only so much thereof as is essential, is as follows:

"Whenever any person sells, gives, purchases, or receives any box, barrel, bag, vessel, package, wrapper, cover, or envelope of any kind, stamped, branded, or marked in any way so as to show that the contents or intended contents thereof have been duly inspected, or that the tax thereon has been paid, or that any provision of the internal revenue laws has been complied with, whether such stamping, branding, or marking may have been a duly authorized act or may be false and counterfeited, or otherwise without authority of law, said box, barrel, bag, vessel, package, wrapper, cover, or envelope being empty, or containing anything else than the contents which were therein when said articles had been so lawfully stamped, branded, or marked by an officer of the revenue, he shall be liable to a penalty of not less than fifty nor more than five hundred dollars. * * * And all articles sold, given, purchased, received, made, manufactured, produced, branded, stamped, or marked in violation of the provisions of this section, and all their contents, shall be forfeited to the United States."

The information which was filed by the government alleged in the second article:

"That prior to the times of said seizure of said barrels and packages they and each of them had been purchased and received by A. Graf & Company, they then being stamped, branded, and marked so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit, a United States gauger; that afterwards and before said seizure said barrels and packages and each of them, and the contents therein contained, were sold to divers persons, each of the barrels and packages at the time of the sale last aforesaid then containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue, to wit, distilled spirits of a different quality, in violation of section 3455 of the Revised Statutes of the United States, whereby and by force of said statute said barrels and packages and all the contents thereof became and are forfeited to the United States."

At the conclusion of the evidence the claimant below, who is the plaintiff in error here, requested the trial court to direct the jury to return a verdict in its favor, on the ground that there was no substantial evidence to sustain the charge which was contained in the information. This instruction was refused, whereupon the trial court, of its own motion, after reciting the substance of the statute as above quoted, charged the jury as follows:

"If he sells the barrel, the barrel having been branded or stamped by one of the revenue officers pursuant to law, and the barrel is empty, that is the first condition. Under those rules no one is permitted to sell the empty barrel containing this brand, because it may be used as an instrument for defrauding the government of its wealth. The second condition is that he may not sell it if it contains anything else at the time of the sale than the contents which were therein when said liquor had been lawfully stamped, branded, or marked. Now, it is claimed that after the gauger put his stamp on those casks, after the proof had been reduced, that between that time and the time when the claimant here, Mr. Graf, sold it, something had been put into those casks. If there was anything put in there other than water, then I charge you that you should find in favor of the government."

An exception was taken to the action of the court in both of the respects last stated, and these exceptions present the principal ques-

tions to be determined on appeal; the jury having returned a verdict in favor of the government.

It will be observed that the information alleged that the barrels and packages in question, when sold, contained "things else than the contents which were therein" when the packages and barrels were stamped and branded, "to wit, distilled spirits of a different quality." After a careful examination of the record we are of opinion that there was no substantial evidence offered by the government to sustain the allegation that distilled spirits of a different quality had been put into the barrels after they were originally stamped and branded. The testimony shows that the spirits which were contained in the three packages now in controversy were manufactured in Kentucky, where the packages were originally stamped and branded by a government gauger. They were subsequently sold by the distiller and transported to the city of St. Louis, Mo., where the proof was reduced by the addition of water. The proof was reduced by the addition of water from 102°, the original proof, to about 90°, or, as one witness says, to 88°. The government obtained samples of the spirits in their original condition from Kentucky, and caused them to be compared by experts with samples which were taken from the packages in controversy after the proof was reduced. The comparison thus made disclosed the presence of a larger percentage of alcohol in the sample which was obtained from Kentucky than in the sample which was taken from the other packages. The former sample contained 52.03 per cent. of alcohol, while the sample taken from the other packages contained 44.52 per cent. Because of this discrepancy, one of the government's witnesses said that the inference was that a part of the original contents of the casks had been withdrawn and other neutral spirits of a cheaper character substituted. This is the only evidence that we find in the record to sustain the allegation that "distilled spirits of a different quality" had been put into the barrels after they were originally stamped and branded. Now, in view of the admitted facts that the spirits contained in these packages had been reduced in proof after their removal to St. Louis by the addition of water, that the proof was so reduced in conformity with law and in the presence of a government gauger, and that by the addition of water the original proof had been reduced as much as 12° or 14°, we have not been able to conclude that the observed discrepancy in the percentage of alcohol formed a sufficient basis for an inference that the change was occasioned by the addition of other spirits of a different quality. It is conceded that the claimant had the right to reduce the proof by the addition of water. To that effect are the authorities, as well as the rulings of the Commissioner of Internal Revenue. *United States v. Thirty-Two Barrels of Distilled Spirits* (D. C.) 5 Fed. 188; *Three Packages of Distilled Spirits* (D. C.) 14 Fed. 569; *United States v. Fourteen Packages of Whiskey*, 66 Fed. 984, 14 C. C. A. 220; *United States v. One Package of Distilled Spirits* (D. C.) 88 Fed. 856; *United States v. Bardenheier* (D. C.) 49 Fed. 846. See, also, letter of the Commissioner of Internal Revenue of date August 8, 1900. The government offered no testimony tending to show that the reduction in the percentage of alcohol could not have been occasioned or was not

adequately accounted for by the addition of water in the manner above mentioned. The mere fact, therefore, that the proof of the spirits had been reduced so as to show a smaller percentage of alcohol, raised no presumption that it had been reduced by putting other spirits of a different quality into the packages, when the reduction could be as well accounted for by the doing of a lawful act, which had in fact been done; that is, by the addition of water. Under these circumstances, we think that there was no substantial evidence that other distilled spirits of a different quality had been introduced into the packages after they were originally stamped and inspected.

In the course of the trial considerable evidence was introduced having a tendency to show that, either at the time when the proof was reduced or subsequently, some caramel coloring matter had been put into the packages to deepen the color of the spirits; and the instruction which the trial court gave was to the effect that if anything whatever was put into the packages, other than water, they became subject to forfeiture. It is most probable, we think, that the jury found that caramel coloring matter had been introduced into the packages, and that they had become forfeited for that reason. This presents the question whether the information was sufficient to warrant a forfeiture on that ground. It did not allege that coloring matter had been put into the barrels after they were stamped, and pray for a decree of forfeiture for that reason, but did allege that the "something else" which had been added was "distilled spirits of a different quality" than those contained in the barrels when they were originally inspected and branded. This was the precise issue tendered by the information. Now, waiving the question whether, when one puts a substance like caramel coloring matter, on which the government does not levy a tax, into a barrel of distilled spirits, he thereby does an act which renders it forfeitable under section 3455 of the Revised Statutes, we think that such an act was not charged in the information, but an altogether different act, and that the government should be held to proof of the fact which it had alleged. In ordinary civil cases the rule is that the proof must conform to the allegations. In a civil suit a party is not permitted to state one cause of action and recover upon another, and there is greater reason why the rule should be enforced in the case in hand, because it is a proceeding of a quasi criminal nature to enforce a forfeiture of property. We feel constrained to hold, therefore, that under such an information as was filed the government was not entitled to a decree of forfeiture on the ground that caramel coloring matter had been put into the packages after they were stamped, and, as there was no substantial evidence to sustain the allegation that other distilled spirits had been put into the packages, we think that the claimant's peremptory instruction to find in its favor ought to have been given. The judgment of the lower court is accordingly reversed, and the case remanded for a new trial.

(129 Fed. 177.)

CARY BROS. & HANNON v. MORRISON.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1904.)

No. 1,928.

1. EXPLOSIVES—BLASTING—RIGHT TO USE TO GRADE RAILROAD.

Blasting by the use of gunpowder or dynamite is an appropriate and justifiable mode of removing rock from the right of way of a railroad in order to bring it to grade, and a railroad company or its grading contractors may lawfully employ it, with reasonable care.

2. SAME—THROWING ROCKS UPON NEIGHBORING PROPERTY—WARNING.

While a contractor may lawfully use blasting with gunpowder or dynamite to remove rock in the right of way of a railroad company, he has no right by its use to throw rocks upon persons rightfully occupying or using neighboring property. Such an act is a trespass, and it is his duty to give such persons reasonable warning of coming explosions.

3. SAME—UNHEEDED WARNING—CONTRIBUTORY NEGLIGENCE.

It is the duty of one who is lawfully using property near to that upon which another is legally engaged in blasting, and who is warned of a coming explosion, to use reasonable diligence to escape from danger on account of it; and a failure to exercise such care, which concurs in producing his injury, waives his right of action for the trespass, and constitutes contributory negligence, which is fatal to his action for damages for the injury.

4. CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—EXCEPTION.

The question whether or not one is guilty of contributory negligence is ordinarily for the jury. It is only when the facts which condition the question are stipulated, or are established by testimony which is free from substantial conflict, and the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it, that the question of contributory negligence may be lawfully withdrawn from the jury.

5. EXPLOSIVES—BLASTING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The defendants were lawfully engaged in blasting rock out of the right of way of a railroad company at a point about 150 feet from a river. The decedent was rightfully walking along the bank of the river a short distance below a point opposite the place of blasting, holding the prow of a ferryboat away from the bank with a pole, while the ferryman was walking ahead of him, pulling the boat up the stream, in the customary way, preparatory to poling it across. The decedent had engaged his passage across the river upon the boat. The custom of the defendants was to send men out, shouting "Fire," at short intervals for a period of 12 or 15 minutes before exploding a charge of gunpowder or dynamite, and the charges had been so heavy that rocks had fallen all around the place where the decedent and the ferryboat were, and had broken limbs and stripped foliage from the trees of the forest which intervened between the right of way and the river, and concealed the boatmen from those engaged in blasting, who were not aware of their presence before the explosion. The decedent had worked for the defendants, and knew these facts and this custom. Seven witnesses heard the cry of fire 12 to 15 minutes before the explosion. Three heard it from 2 to 5 minutes before. When the ferryman heard it, he shouted "Don't shoot," and he and the decedent continued to ascend the stream within 200 or 300 feet of the place of blasting. The ferryman heard it again, and answered it again, and they continued up the river. The ferryman heard it a third time, answered again, the signal to explode the blast was given, the charge was fired,

¶ 2. See Explosives, vol. 23, Cent. Dig. §§ 9, 10.

and a rock fell upon the decedent and killed him. The defendant's witnesses testified that they did not hear the cry "Don't shoot."

Held, the question whether or not the decedent was guilty of contributory negligence was for the jury.

Thayer, Circuit Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Western District of Arkansas.

G. B. Rose (U. M. Rose and W. E. Hemingway, on the brief), for plaintiffs in error.

Ira D. Oglesby (W. E. Atkinson and Geo. O. Patterson, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. This writ of error questions the proceedings at the trial of an action for negligence brought by Mrs. T. Jane Morrison, the administratrix of the estate of W. L. Morrison, against Cary Bros. & Hannon, a partnership composed of the defendants below, which resulted in a judgment against the defendants for \$6,000. In her complaint the plaintiff alleged that her husband, W. L. Morrison, was killed by a blow from a rock which was carelessly thrown from a blast by the defendants, who were then engaged in grading the Little Rock & Ft. Smith Railroad. The defendants denied that they were guilty of negligence, and alleged that the injury and death of Morrison were caused by his own carelessness, in that he disregarded warnings that the explosion was about to occur, and refused or neglected to seek a less dangerous place. At the close of the trial the court, in effect, charged the jury that Morrison was free from negligence, and that, if they believed that the defendants were guilty of carelessness which caused his injuries and death, the plaintiff was entitled to a verdict. This instruction is challenged, and its consideration necessitates a review of the facts disclosed by the evidence at the trial, which were these: Cary Bros. & Hannon had been engaged at the place where the accident occurred in blasting heavy rocks out of the right of way of the Little Rock & Ft. Smith Railroad Company for about two weeks. At the place where they were at work the right of way ran east and west parallel to, and about 150 feet distant from, a river 1,200 feet wide. The surface of the ground along the right of way was higher than that of the river, and between them was a forest, which, with its foliage, made it impossible to see the river from the surface of the ground along the right of way, although there was testimony that it was visible from a pile of timber and brush some 20 to 90 feet distant from the explosion. On the bank of the river, and about 700 feet below and east of a point upon the river directly south of the place of the blasting, was a landing place for a ferry; and between these two points, and about 350 feet from the landing, was a mill. The country was sparsely populated, and there was but one house, aside from the mill, within 700 feet of the place of the fatal blast. The contractors had been using heavy charges of powder, and had thrown rocks in every direction, some of them 700 feet from the place of the explosion, but

naturally many more had fallen nearer to the place of the blasting than at a greater distance. Between the place of the explosion and the river much foliage had been stripped from the trees, and their limbs had been broken by falling rocks. The custom of the defendants had been and was to send their employés out 12 or 15 minutes before a charge of powder was to be fired, shouting the word "Fire" at short intervals, for the purpose of warning all persons in the vicinity of the coming explosion, so that they might retire out of danger. Morrison was a laborer, a farmer, and a minister, who earned annually about \$100 by the first, about \$300 by the second, and about \$75 by the third occupation. He had been an employé of the defendants at the place of the explosion within two weeks before the accident occurred, had seen heavy charges of powder exploded, was aware of their effect, and knew how the warning of a coming blast was given, and all the facts which have been recited. The customary method of operating the ferryboat at this time was to tow it up the stream, so that the current would not carry it below the opposite landing, and then to pole it across the river. But the defendants' witnesses testified that they were not aware that the ferryboat ever came up along the bank in that way. At a time when the defendants had a charge of powder nearly ready for explosion, about 2 or 3 o'clock in the afternoon of October 5, 1902, Morrison came from the north to the landing place of the boat for the purpose of crossing the river upon it. When the boat was ready to cross the river, it was loaded with a team of mules, a wagon, and one Davis, the owner of the mules. Thereupon the ferryman walked up along the north bank of the river, and dragged the boat after him by means of a rope attached to it, while Morrison walked along the bank behind him, and pushed the prow of the boat away from the bank with a pole. When they had arrived at a point above the mill, but below a point opposite the place of the blasting, Davis heard the cry of fire, the ferryman shouted "Don't shoot," and they proceeded on their way up the river. After a short interval Davis again heard the shout "Fire," and the ferryman again cried "Don't shoot," while they continued on their way. And after another interval Davis heard the cry of fire again, the ferryman again cried "Don't shoot," Davis heard the words "All right," the explosion occurred "right then," and a rock from the blast fell upon Morrison and killed him. The defendants' witnesses testified that they did not hear the cry "Don't shoot," did not know that Morrison and his companions were near their place of work, and that the words "All right" were addressed to the operator of the battery, and constituted the signal for the explosion. The course of proceeding of the defendants and their employés up to this time had been this: About 12 or 15 minutes before the explosion, men had been sent out, crying "Fire," and they continued to repeat the cry at short intervals until the explosion occurred. One of the employés of the defendants stepped on some logs about 100 feet from the river, faced it, and shouted "Fire." After he had done this he walked 500 feet to the battery before the explosion. Seven witnesses testified that they heard the cry of fire 12 or 15 minutes before the explosion. Three witnesses only, and they were on the opposite side of the river, testified that they first heard the cry from 2 to 5 minutes before the explosion. The

witness Hines testified that he was sitting on the north bank of the river, opposite the mill, when he first heard the warning; that this was 12 or 15 minutes before the explosion; that the ferryboat was then no more than 200 feet above him (and that would have been about 150 feet below a point opposite the place of the blasting); that he heard the cry of fire five times, and that after he first heard it he went north and east 1,000 feet, in order to get out of danger before the explosion occurred. Yandell, another witness, who was on the opposite side of the river, and who did not hear the cry until from 2 to 5 minutes of the explosion, walked 120 feet away from the river after he heard it, and before the explosion, in order to place himself without the range of danger. And Prendergast, who was also on the other side of the river, testified that he heard the cry 15 minutes before the explosion, and went under a shed for shelter. Davis was the only one of the men who were with the boat at the time of the accident who appeared at the trial, and he testified that when he first heard the cry of fire the boat was a little below a point opposite the place of explosion, and that the ferryman dragged it up the river two boat lengths, or 90 feet, and commenced to roll up his lines to start to cross the river before the blast came.

In this state of the evidence the court below instructed the jury, in effect, that there was no question of contributory negligence for their consideration, and that, if the defendants were guilty of negligence, the plaintiff was entitled to their verdict. It refused to charge, at the request of the defendants, that if Morrison was a passenger on the ferryboat, but was walking along the bank of the river, pushing the boat from the bank, and if he heard the warning, and made no effort to get out of danger, but continued to walk along the bank, he was guilty of contributory negligence. It also refused the request of the defendants to instruct the jury that it was the duty of Morrison, when he was made aware of the fact that a blast was about to be fired, to use reasonable diligence to get out of danger. It charged them that it was not the duty of Morrison to abandon the boat in the event that he was crossing the river and was a passenger when the warning was given. These rulings present the question to be considered in this case.

The railroad company and its contractors, the defendants, had the right to grade its road along its right of way. The right to accomplish a result includes the right to use the appropriate means to produce it. In a sparsely settled country, blasting by means of gunpowder or dynamite is a reasonable and justifiable way of removing ledges and rocks for the purpose of bringing a railroad to a proper grade, and a corporation and its contractors have the right to use this method, provided they exercise reasonable care to protect others from injury. *Dodge v. County Commissioners of Essex*, 3 Metc. (Mass.) 380, 383; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Brown v. Providence, etc., R. Co.*, 5 Gray, 35, 40; *Blackwell v. Lynchburg, etc., R. Co.*, 111 N. C. 151, 153, 154, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786; *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196, 205, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 804; *Gates v. Latta*, 117 N. C. 189, 190, 23 S. E. 173, 53 Am. St. Rep. 584; *Mitchell v. Prange*, 110 Mich. 78, 67 N. W. 1096, 34 L. R. A. 182, 64 Am. St. Rep. 329.

While a railroad company has the right to blast rock from its right

of way by means of gunpowder or dynamite, it has no right, without warning, to throw rocks upon persons who are lawfully occupying or using neighboring property, and such an act is a trespass. *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Wright v. Compton*, 53 Ind. 337; *St. Peter v. Denison*, 58 N. Y. 416, 423, 17 Am. Rep. 258; *Colton v. Onderdonk*, 69 Cal. 155, 159, 10 Pac. 395, 58 Am. Rep. 556.

It is, however, the duty of one who is lawfully using neighboring property, and who is warned of a coming explosion by another, who is rightfully engaged in blasting, to use reasonable diligence to escape from danger from the approaching explosion; and a failure to exercise such care, which concurs in producing his injury, waives the right of action for the trespass, constitutes contributory negligence, and is fatal to an action for the recovery of damages on account of the injury. *Sullivan v. Dunham*, 10 App. Div. 438, 440, 41 N. Y. Supp. 1083; *Wright v. Compton*, 53 Ind. 340, 341; *Graetz v. McKenzie* (Wash.) 35 Pac. 377, 378; *Mills v. Wilmington City Ry. Co.* (Del. Super.) 40 Atl. 1115; 2 *Shearman & Redfield on Law of Negligence*, § 688a.

In the case at bar, therefore, the defendants had the right to remove the ledges and rocks from the right of way of the railroad company by explosions of gunpowder or dynamite. The decedent, Morrison, had the right to walk along the bank of the river for the purpose of accompanying the boat to its starting point, and crossing upon it to the opposite side. It was the duty of the defendants to warn Morrison and every other person within the circle of danger of the coming explosion they were about to cause. It was the duty of Morrison and of every one thus warned to exercise reasonable diligence to escape from the danger from the explosion and from the threatened injury, and if they failed to exercise this diligence, and their failure contributed to their injury, it was fatal to an action for damages on account of it. The evidence is conclusive that Morrison was warned of the danger, and the conclusion is inevitable that the court below fell into an error when it refused to instruct the jury that it was his duty, after he was thus warned, to exercise reasonable diligence to escape from the threatened injury, unless the necessary deduction from the undisputed evidence was such that all reasonable men, in the exercise of an impartial judgment, would be compelled to conclude that he exercised reasonable care or diligence to escape from the impending danger. The question of contributory negligence, like every question of negligence, is ordinarily for the jury; and it is only when there is no substantial conflict in the evidence which conditions it, and when, from the undisputed facts, all reasonable men, in the exercise of a fair judgment, would be compelled to reach the same conclusion, that the court may lawfully withdraw it from them. *St. Louis, I. M. & S. R. Co. v. Leftwich*, 54 C. C. A. 1, 2, 117 Fed. 127, 128; *Railroad Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65; *Pyle v. Clark*, 25 C. C. A. 190, 192, 79 Fed. 744, 746; *Railroad Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

In the case at bar neither of these conditions existed. The evidence which conditions the question of contributory negligence is not free

from substantial conflict, and, if the view of it most favorable to the defendants is taken, as it must be in this case, where the instruction which took the question from the jury was for the plaintiff, reasonable men might well conclude that the decedent was not free from negligence which contributed to his injury. The crucial fact in the case is the time when Morrison first heard the cry of fire. That time is not fixed by the testimony of any witness, but it must be found from the evidence of the witnesses who heard the cries. No one testifies when Morrison first heard them. The great preponderance of the testimony is that the shouts of fire were made at short intervals for a period of from 12 to 15 minutes before the explosion. Seven witnesses heard them at least 12 minutes before the blast was fired. One of these witnesses was about 200 feet below Morrison, on the same bank of the river, and another was on the opposite side of the river, 2,200 feet from the place of the explosion. Three witnesses who were on the other side of the river testified that they first heard the cry of fire, and the ferryman's answer, "Don't shoot," from 2 to 5 minutes before the explosion. The natural and rational inference from all this testimony is that the shouts of fire were given for at least 12 minutes before the blast, but that the three witnesses on the other side of the river did not hear the earlier shouts. Did Morrison first hear the warnings when the seven witnesses, many of them farther from the place of blasting than he was, first heard them, or when the three witnesses on the other side of the river first perceived them? The evidence is certainly ample to sustain a finding that Morrison first heard them when the majority of the witnesses first perceived them, 12 or 15 minutes before the explosion. The preponderance of the evidence points to that conclusion. If he heard this warning 12 or 15 minutes before the explosion, all reasonable men would not be compelled, in the exercise of a sound judgment, to conclude that remaining within the circle of danger, or advancing into greater danger, when he was on the bank of the river and free to escape from all danger, was the exercise of reasonable care or diligence.

Again, there is sufficient evidence in this record to warrant a finding by the jury that the ferryboat was at least 150 feet below a point opposite the place where the explosion occurred when the ferryman first cried "Don't shoot." Three witnesses testify that this cry was first heard by them from 2 to 5 minutes before the explosion. Davis says that the ferryman was walking fast, drawing the boat up the river, and then rolling up his lines to start across the river, during this time. A man walking slowly—walking only 3 miles an hour—travels 528 feet in 2 minutes; and the boat sank only 800 feet above the landing, and not more than 100 feet above a point opposite the place of blasting. Davis testifies that the boat was a little below a point opposite the place of the explosion when he first heard the cry of fire. Hines says that it was at least 150 feet below that point when he first heard the cry, and that he was within 200 feet of it. Davis says that the boat went about 90 feet after he first heard the warning, and the testimony of two witnesses on the other side of the river is that the boat seemed to be about opposite the place of the blasting when they first heard the cry "Don't shoot." But Davis' estimates of distance were demonstrated by the measurements to be erroneous. He thought the dis-

tance from the place of the explosion to the point where the boat sank was 450 feet. It was 198 feet. He said he heard the first cry of fire about 900 feet above the landing. But the distance from the landing to the place where the boat sank was only 800 feet. Thus it appears that the evidence was substantial and sufficient to sustain a finding that the boat was 150 feet below the place of blasting when the ferryman first cried "Don't shoot," and when Morrison must have been aware of the danger.

Moreover, wherever the boat may have been, there were at least 2 minutes—time enough for one to go on a slow walk 528 feet, and on a brisk walk 700 feet, after the ferryman first cried "Don't shoot," and before the explosion occurred. It was only about 700 feet from the point on the river opposite the place of blasting to the landing. Every step down the river, away from the place of explosion, diminished the danger of injury. Every step towards it increased the danger. Would a person of ordinary prudence and diligence under such circumstances remain in the imminent danger or advance into increasing danger? Or would he flee from the point of greatest danger, when every step down the river would diminish the chance of his injury? Some reasonable men might well conclude that a person of ordinary prudence and diligence would, under such circumstances, move away, instead of advancing toward or remaining near the point of greatest danger. That was the course pursued by every person within hearing of the warning, except the men about the ferryboat. Five of those who thus retired upon hearing the warning were much farther away from the place of the explosion than Morrison was, and four of them were on the opposite side of the river. Hines, on the same bank, 200 feet below Morrison, traveled 1,000 feet north and east after he heard the cry, and before the explosion occurred. Prendergast, 2,200 feet away, on the other side, took shelter under a shed. Yandell, Pointer, and Travers, on the opposite side of the river, and at least a quarter of a mile distant, turned and walked farther away. The ferryman had the care of his boat. Davis had the care of his mules. Morrison had the care of nothing but himself. He was walking on the bank of the stream, with no responsibility, care, or duty, save the duty to heed the warning and use ordinary care to retire from the impending danger. This was not a case where the facts which conditioned the question of contributory negligence were stipulated, or where they were established by undisputed testimony. It was not a case where, from the facts which the evidence tended to establish, no reasonable men could have rightfully drawn the conclusion that Morrison failed to exercise ordinary care and diligence to escape from the impending danger after he received the warning of it, and the question of his contributory negligence should have been submitted to the jury. It was a debatable question—one upon which the minds of reasonable men might honestly reach opposite conclusions—and hence one peculiarly appropriate for the determination of a jury of men of the vicinage, who are necessarily familiar with the methods of life and action in the country where the accident occurred, and of the course of action which men of ordinary sagacity usually pursue when they are notified that a heavy charge of powder to blast out

rock, which has been falling from such blasts all about the place they are occupying, is about to be exploded. The facts were not so clearly established, nor the inference from them so conclusive, that the court below should have instructed the jury either that if Morrison was a passenger, and was walking along the bank, pushing the boat away from the land with a pole, when he heard the warning, and made no effort to escape, but continued to walk up the river until the explosion, he was guilty of contributory negligence, or that it was not his duty to abandon the boat in the event that he was crossing the river and was a passenger when the warning was given. The court gave the latter instruction. It was erroneous, because the evidence was undisputed that Morrison was not crossing the river when he heard the warning, but was walking on its bank, and because, when he heard the warning, he owed no duty to the boat, nor to the men about him, which was not subordinate to his positive duty to immediately use reasonable diligence to decrease, and if possible to entirely avoid, the impending danger.

There are other specifications of error, but the discussion of those which have been already considered sufficiently indicates the law applicable to the case, and determines the disposition which must be made of it in this court.

The judgment below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to grant a new trial.

THAYER, Circuit Judge (dissenting). The defendants below, who are the plaintiffs in error in this court, requested the trial court to give four instructions on the subject of contributory negligence, all of which were refused, and the sole question before this court is whether a reversible error was committed in refusing these instructions, or any of them. The first of the four instructions was as follows:

"The evidence shows that at the time of hearing the warning, and until he was killed, Morrison was not in the boat, but was walking on the bank; that he was a passenger, and under no obligation to look out for the safety of the boat or its contents; and you are instructed that when he heard the alarm it was his duty to proceed down the bank in search for a place of safety, and that, if he did not do so, he was guilty of contributory negligence which precludes of recovery in this case."

The second and third instructions embodied the same idea, namely, that if Morrison heard the alarm of fire while walking along the bank and poling the ferryboat offshore, and made no effort to get out of danger after he heard the alarm, he was guilty of contributory negligence.

The fourth instruction was a mere abstract proposition of law, to the following effect:

"The court, in this connection, instructs you that it was the duty of the decedent, Morrison, when he was made aware of the fact that a blast was to be fired, to use reasonable diligence to get out of danger."

I have not been able to conclude that the refusal of either of these instructions constitutes a reversible error. The first three of these instructions were palpably wrong and misleading, in that they ignored material facts which the testimony for the plaintiff below strongly tend-

ed to establish. This testimony was to the effect that no warning of the blast which was about to be fired was given until the ferryboat had started on its voyage across the river, and had proceeded upstream from 150 to 300 yards above the landing; that, when the alarm of fire was given, the captain of the ferryboat immediately hallooed back as loud as he could, two or three times, not to fire until the boat got away, or "Don't shoot until we get away," and that the reply immediately came back from some person in the vicinity of the blast, "All right." In other words, the testimony for the plaintiff below showed that the persons on the ferryboat and alongside of it, including the deceased, were led to believe, by the reply "All right," which was made to the captain's exclamation "Don't shoot," that the firing of the blast would be deferred until the boat had got out of danger. Obviously, then, if such was the fact, and the jury had so found, as they might well have done, under the testimony, it could not be said that the deceased was guilty of contributory negligence, as these instructions declared, because he did not drop his pole and search for a place of safety immediately after the alarm of fire was given. The first three instructions that were asked on the subject of contributory negligence wholly ignored this phase of the testimony, and the trial court properly refused these requests for that reason.

The fourth instruction, above quoted, stated merely an abstract proposition of law, giving the jury no precise direction as to what the deceased's conduct should have been on the occasion in question. If the deceased heard the alarm of fire, and also heard the captain's exclamation "Don't shoot," and the response "All right," and understood from such response, as he probably did, that the blast would not be fired until the boat was out of danger, no one can say that he did not exercise reasonable diligence in acting as he did. On the other hand, if he did not hear such response, and was not given to understand that the blast would not be fired, the exercise of reasonable diligence might, in the estimation of the jury, have required him to act differently than he did. The fault with this instruction, in my judgment, was that it was too general in its terms, not adapted to the different phases of the testimony, and was not calculated to give the jury any information concerning their duty in the premises. Instructions ought always to be adapted to the various hypotheses of fact which may be found by a jury, and a judgment ought not to be reversed because the trial court fails to give an instruction, as respects some abstract rule of law, however accurate it may be, which is not calculated to aid the jury in reaching a correct conclusion. There is abundant evidence in the record to support the conclusion that the plaintiffs in error were guilty of negligence. Indeed, I do not understand that fact to be challenged by the majority opinion. The testimony shows that the blasts which they were in the habit of firing from this cut were very heavy. When fired they showered the surrounding country with rock, and put the lives of every one who was within the vicinity in peril. It was shown that only a day or two previous to the accident in question a blast had been fired which threw a rock weighing 20 tons entirely across the river. Under these circumstances, it was the duty of the defendants below to have taken greater care than they appear to

have taken to ascertain, before firing a blast, whether all persons within the danger line had been duly notified of the expected explosion, and were in a place of safety, or had been given time to reach a place of safety. Certainly such blasts as the one in question ought not to be fired in proximity to a ferry landing, and near a public highway, without taking such precautions as are fully adequate to protect human life. In the present instance the area of danger was so large that if the decedent, when he first heard the warning cry, "Fire," had dropped his pole and run in any direction, he might not have reached a place where he would have been any safer than by remaining where he was; but, conceding it to be true that it was his duty to have made some effort to reach a place of safety after he heard the warning cry of fire, yet the plaintiffs' evidence, if credited by the jury, was of such a character as excused him from making any such effort. I think that no instruction on the subject of contributory negligence, such as was requested, ought to have been given, and that the record discloses no reversible error.

(129 Fed. 186.)

HARGROVE et al. v. CHEROKEE NATION.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1904.)

No. 1,866.

1. JUDGMENT—PERSONS BOUND—PURCHASER PENDING SUIT.

In a suit under section 3 of Act June 28, 1898 (30 Stat. 495, c. 517), which authorizes a suit by a tribe in the Indian Territory to recover lands held by those claiming membership in the tribe, but whose membership or right has been disallowed by the commission or the United States court, and the judgment has become final, the general rule applies that a stranger cannot, by a conveyance or transfer of possession from the defendant pendente lite, acquire any rights which are not subject to the judgment subsequently rendered in the suit, whether or not he is made a party thereto; and where such a purchaser or transferee is brought in by an amended complaint it is not necessary to allege that his membership in the tribe has been disallowed.

2. INDIANS—ACTION TO DISPOSSESS INTRUDER ON LANDS OF TRIBE—NOTICE BEFORE SUIT.

Act June 28, 1898 (30 Stat. 495, c. 517), provides for the bringing of suits by any tribe in the Indian Territory to dispossess intruders on lands of the tribe, and authorizes such suit by any member of the tribe where the chief or governor falls or refuses to bring it. Section 5 requires the party bringing such suit to serve notice on the adverse party to leave the premises at least 30 days before the suit is commenced; and by section 2 it is provided that when, in the progress of any civil suit in a court of the territory, it shall appear that the property of any tribe is affected by the issues, it shall be the duty of the court to make such tribe a party by service on the chief or governor. *Held* that, where a suit to dispossess an intruder was originally brought by a member of a tribe who had served the required notice, such notice was sufficient, although the Cherokee Nation afterward joined, and became the plaintiff in the suit.

3. SAME—DAMAGES FOR DETENTION OF PROPERTY.

Where, in such a suit, it appeared that a defendant brought in by an amended complaint, by an agreement with the original defendants, obtained possession of the premises and improvements after the bringing of the suit, and wrongfully withheld possession from the tribe, a judgment may properly be rendered against him of the damages caused by his wrongful detention, as well as for possession of the property.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 69 S. W. 823.

An act of Congress approved on June 28, 1898, entitled "An act for the protection of people of the Indian Territory, and for other purposes" (30 Stat. 495, c. 517), contains, among others, the following provisions:

"Sec. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action.

"Sec. 3. That said courts are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the Five Tribes, or the United States court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same: provided always, that any person being a non-citizen in possession of lands, holding the possession thereof under an agreement, lease, or improvement contract with either of said nations or tribes, or any citizen thereof, executed prior to January first, eighteen hundred and ninety-eight, may, as to lands not exceeding in amount one hundred and sixty acres, in defense of any action for the possession of said lands show that he is and has been in peaceable possession of such lands, and that he has, while in such possession made lasting and valuable improvements thereon, and that he has not enjoyed the possession thereof a sufficient length of time to compensate him for such improvements. Thereupon the court or jury trying said cause shall determine the fair and reasonable value of such improvements and the fair and reasonable rental value of such lands for the time the same shall have been occupied by such person, and if the improvements exceed in value the amount of rents with which such persons should be charged the court, in its judgment, shall specify such time as will, in the opinion of the court, compensate such person for the balance due, and award him possession for such time unless the amount be paid by claimant within such reasonable time as the court shall specify. If the finding be that the amount of rents exceed the value of the improvements, judgment shall be rendered against the defendant for such sum, for which execution may issue.

"Sec. 4. That all persons who have heretofore made improvements on land belonging to any one of the said tribes of Indians, claiming rights of citizenship, whose claims have been decided adversely under the Act of Congress approved June tenth, eighteen hundred and ninety-six, shall have possession thereof until and including December thirty-first, eighteen hundred and ninety-eight; and may, prior to that time, sell or dispose of the same to any member of the tribe owning the land who desires to take the same in his allotment: provided, that this section shall not apply to improvements which have been appraised and paid for or payment tendered by the Cherokee Nation under the agreement with the United States approved by Congress March third, eighteen hundred and ninety-three.

"Sec. 5. That before any action by any tribe or person shall be commenced under section three of this act it shall be the duty of the party bringing the same to notify the adverse party to leave the premises for the possession of which the action is about to be brought, which notice shall be served at least thirty days before commencing the action by leaving a written copy with the defendant, or, if he cannot be found, by leaving the same at his last known place of residence or business with any person occupying the premises over

the age of twelve years, or, if his residence or business address can not be ascertained, by leaving the same with any person over the age of twelve years upon the premises sought to be recovered and described in said notice; and if there be no person with whom said notice can be left, then by posting same on the premises.

"Sec. 6. That the summons shall not issue in such action until the chief or governor of the tribe, or person or persons bringing suit in his own behalf, shall have filed a sworn complaint, on behalf of the tribe or himself, with the court, which shall, as near as practicable, describe the premises so detained, and shall set forth a detention without the consent of the person bringing said suit or the tribe, by one whose membership is denied by it: provided, that if the chief or governor refuse or fail to bring suit in behalf of the tribe then any member of the tribe may make complaint and bring said suit."

Pursuant to the provisions of the foregoing act of Congress, one Claude S. Shelton, who was an Indian, and a member of the Cherokee tribe of Indians, appears to have brought an action against J. S. Hargrove et al., the plaintiffs in error, in which action the Cherokee Nation subsequently joined as a party plaintiff. The original complaint, which was filed by Shelton, is not found in the present record, but the action so brought was tried, resulting in a judgment in favor of the plaintiffs, whereupon the defendants prosecuted an appeal to the United States Court of Appeals in the Indian Territory. The latter court reversed the judgment of the lower court for reasons fully disclosed in its opinion. *Vide Hargrove v. Cherokee Nation* (Ind. T.) 58 S. W. 667. On the return of the record to the lower court, the defendants filed a motion to dismiss the action, which motion was overruled. The plaintiffs thereupon asked leave to amend the complaint by making one Samuel H. Conklin a party defendant, and leave to that effect was granted. An amended complaint was thereupon filed, and afterwards a second amended complaint, on which the judgment now before this court for review was subsequently rendered. By the second amended complaint Conklin was made a party defendant, and with leave of court Shelton's name was stricken out as a party plaintiff, so that the action was thereafter prosecuted to final judgment by the Cherokee Nation as the sole plaintiff. To this second amended complaint the defendants below, who are the plaintiffs in error here, interposed a demurrer on the following grounds: First, that the court had no jurisdiction of the person of the defendant Conklin, or of the subject of the action as to said defendant Conklin; second, that the plaintiff had no legal capacity to sue the defendant Conklin; third, that there was a defect of parties defendant; and, fourth, that the amended complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer. The defendants declined to plead further, whereupon a judgment was rendered against them, which was subsequently affirmed on a second appeal to the United States Court of Appeals in the Indian Territory (60 S. W. 823), and the judgment which was so affirmed is before this court for review on a writ of error.

M. M. Edmiston, for plaintiffs in error.

James S. Davenport, for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

As there was no trial below except on demurrer, and as the record contains no bill of exceptions, the questions for consideration by this court are those which arise on the face of the record, and are in the main those which are presented by the demurrer to the second amended complaint.

The reason assigned in support of the first ground of demurrer, namely, that the court had no jurisdiction of the case as respects the defendant Conklin, and no right to render a judgment against him,

appears to be this: that the amended complaint contains no allegation that Conklin's right to the improvements in controversy had been disallowed by the decision of the commission to the Five Tribes, or a judgment of the United States court in the Indian Territory, which had become final at the time he was made a party defendant. It is urged, in substance, that under the provisions of the third section of the act of Congress above quoted, under which the action is brought, the court before whom the case was tried had no power to cause Conklin to be removed, and the premises in controversy to be restored to the Cherokee Nation, until his membership in the tribe "and right" had been (as the act says) "disallowed by the commission to the Five Tribes or the United States court, and the judgment had become final"; and that, as the complaint showed no such disallowance of his membership and rights by the commission or the United States court, the lower court had no jurisdiction over him in this statutory proceeding. This contention is founded, apparently, upon a misconception of the reasons which caused the Cherokee Nation to make Conklin a party defendant. Its second amended complaint alleged that the defendants other than Conklin were claimants to citizenship in the Cherokee Nation, whose claim had been decided adversely to them by the United States courts and the Dawes commission, and that the judgment had become final; that said defendants were, at the time of the institution of this action, holding the improvements in controversy as claimants to citizenship in the Cherokee Nation; that the defendant Conklin, on or about and since the institution of the suit, had taken possession of the improvements in controversy jointly with the other defendants—that is, with the Hargroves; that he so took possession under an arrangement with the other defendants for the purpose of defeating the Cherokee Nation of its right to the improvements; that at the time of the institution of the present action Conklin had a suit pending against the other defendants to obtain possession of the identical improvements now in controversy; that the Cherokee Nation had filed its interplea in said case for the protection of its rights; and that subsequent to the filing of such interplea Conklin, through his attorney, had dismissed his action to recover the improvements from the other defendants, doing so in pursuance of a combination or agreement with the other defendants for the purpose of holding the improvements in controversy contrary to and against the will of the Cherokee Nation. The complaint contained another allegation to the effect that the defendants were at the time in unlawful possession of the lands and improvements in controversy, that they were not the owners thereof or entitled to the possession, and that the Cherokee Nation was the absolute owner, and as such entitled to the immediate possession of the same.

Fairly construed, these allegations of the complaint must be understood to mean that Conklin acquired such possession as he had subsequent to the commencement of the present action against the other defendants, who were in possession of the improvement in controversy when the suit was instituted, and whose claim and right thereto had been disallowed by the commission, and that such possession as he had gained was obtained by collusion with the other defendants to prevent the Cherokee Nation from recovering the possession of the im-

provement in this action, which was then pending. In view of the foregoing averments, it is manifest, we think, that Conklin was named as a party defendant to the second amended complaint upon the theory that he could not, by collusion with the Hargroves, take possession of the land and improvements in controversy subsequent to the institution of the action, and by so doing defeat the purpose of the suit, although such claim to the improvement as he may have had had not been disallowed by the commission or the United States courts. This view of the case appears to us to be well founded. It is a general rule of law, and one which is absolutely essential to the effective prosecution of an action for the recovery of the possession of real property or to enforce a lien against the same, that one who acquires possession of property from a person against whom a suit is at the time pending for the possession thereof or to enforce a lien against the same takes it subject to the outcome of the pending action, and may be dispossessed precisely as the person from whom he acquired the possession might have been dispossessed had he retained the possession, whether such intruder is made a party to the suit and has his day in court or not. Any other rule would render suits for the recovery of real property ineffectual, as they might be defeated by repeated transfers of possession during the pendency of the action. *Tilton et al. v. Cofield*, 93 U. S. 163, 168, 23 L. Ed. 858; *Whiteside v. Haselton*, 110 U. S. 296, 301, 4 Sup. Ct. 1, 28 L. Ed. 152; *Burleson v. McDermott*, 57 Ark. 229, 21 S. W. 222; *Bailey v. Winn*, 113 Mo. 155, 165, 20 S. W. 21. See, also, *Am. & Eng. Ency. of Law*, vol. 21 (2d Ed.), p. 595, and cases there cited. We perceive no reason why this doctrine should not be held applicable to a case like the one at bar, which is an action by the Cherokee Nation to recover an intruder's improvement on land belonging to the nation, although it is a statutory proceeding authorized by an act of Congress. The same reasons exist in such a case as in ordinary cases why an action which is brought by the nation in pursuance of the statute to recover an improvement, provided it is brought against the parties who are in actual possession at the time the suit is instituted, should not be affected, or in any manner interrupted, by a subsequent transfer of the possession to a third party. The facts alleged in the complaint as against Conklin are fully admitted by the demurrer, and inasmuch as it appeared that he acquired possession of the improvement subsequent to the institution of the suit against the Hargroves, he could have been ousted by the nation under a judgment against them, even if he had not been made a party. We are of opinion, therefore, that he has no right to complain because he was made a party and given an opportunity to assert his rights if he had any; and we entertain no doubt of the jurisdiction of the court as respects Conklin, or of its power to enter a judgment against him for the restoration of the land and the improvements thereon to the Cherokee Nation.

The other objections to the amended complaint, which are specified in the demurrer, are that there "is a defect of parties defendant," and that "said amended complaint does not state facts sufficient to constitute a cause of action." The first of these objections only challenges the right of the plaintiff to make Conklin a party defendant, as it saw fit to do. It therefore presents the same question which has

already been considered and decided. As Conklin acquired possession from the other defendants after the suit was brought, we are of opinion that the Cherokee Nation had the right to make him a party defendant if it thought proper to do so, and that he has no cause for complaint on that ground.

The next objection—to the sufficiency of the amended complaint—raises but one question, and that is whether such a notice was given to the defendants as is required by the fifth section of the act of June 28, 1898, *supra*. The complaint shows that the original defendants were served with the statutory notice by the original plaintiff, C. S. Shelton, but it does not aver that the nation itself served or caused such a notice to be served on the defendants prior to its becoming a party plaintiff; and the question to be determined is whether the notice which was given by Shelton is sufficient to sustain the action. The act of Congress above quoted clearly contemplates that actions for the recovery of intruder's improvements in the Indian Territory shall be brought by the tribe to whom the lands belong, but the proviso to the sixth section of the act declares "that, if the chief or governor refuse or fail to bring suit in behalf of the tribe, then any member of the tribe may make complaint and bring said suit." The fifth section of the act in terms permits the party who institutes the suit, whether it be the tribe or a member of the tribe, to serve the prescribed notice, and the second section of the act makes it the duty of the court, when it appears that the property of the tribe is "in any way affected by the issues being heard" in a suit pending before it, "to make said tribe a party to said suit." It further declares that "the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action." Now, if the original action which was brought by Shelton had come to trial before the Cherokee Nation had elected to join in the proceeding, it would have been the duty of the court before whom the case was tried, under the second section of the act, to have made the nation a party, and in that event it could hardly be claimed that the nation would have been under an obligation to serve a second notice before it could have been made a party and allowed to take part in the prosecution of the suit. Moreover, the notice which the fifth section of the act requires to be served is merely intended to advise the intruder that his claim is contested, and to give him a fair opportunity to abandon his holding before any costs are incurred. One notice to this effect, by a person entitled to give it, is certainly as effective as many. In view of these considerations and the various provisions of the act, we feel constrained to hold that, when a member of a tribe gives the requisite notice to an intruder, and subsequently brings a suit on the strength thereof, and thereafter the nation elects to join in the suit, it may do so without giving another notice in its own behalf; in other words, we are of opinion that it may properly adopt or ratify the action of one of the members of the tribe, who, in bringing a suit to dispossess an intruder in the Indian country, really acts in behalf of his tribe and for its benefit. We conclude, therefore, that the second amended complaint was not fatally defective because it failed to show that a notice had been given by the nation itself, and, as the complaint contains all the other allegations necessary to the establishment

of a cause of action in behalf of the Cherokee Nation, the demurrer to the complaint was properly overruled.

While the point is not argued in the brief of counsel for the plaintiffs in error, yet we have considered the question whether the lower court acted properly in rendering a judgment against the defendant Conklin for the damages occasioned by the unlawful detention of the improvement as well as for the possession of the property. It may be assumed, we think, that this question is fairly raised by the demurrer to the second amended complaint, which challenges the jurisdiction of the court to render a judgment against Conklin of any kind. After due consideration of this question, we have concluded that the judgment against Conklin for damages can be upheld as well as the judgment for possession. It stands admitted by the demurrer to the complaint that he joined with the other defendants in withholding possession of the improvement from the Cherokee Nation, in consequence of which the damages were incurred; and, while the complaint alleges that he entered into possession of the improvement subsequent to the institution of this suit, yet it further avers that his entry was on or about the time the action was commenced, from which we must infer that the wrongful and collusive entry was almost coincident with the institution of the suit. We are aware of no sufficient reason why one who wrongfully intrudes upon the possession of property after a suit to recover it has been brought by the true owner should not be held responsible for the rents and profits of the property from and after the date of his entry. A judgment against such a person for the damages incident to a detention of the property, in which he participated, would seem to be as proper as a judgment against him for the possession. In the present instance the record discloses that the damages which were awarded were assessed by a jury which was called to assess the damages after the demurrer to the amended complaint had been overruled, and, as there is no bill of exceptions bringing the testimony upon the record, we must presume that the assessment rests upon adequate evidence, and is in all respects correct.

Finding no error in the proceedings which, in our judgment, would warrant a reversal of the judgments below, they are each hereby affirmed.

(127 Fed. 541.)

SUPREME COUNCIL A. L. H. v. CHAMPE.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1904.)

No. 1,234.

1. FRATERNAL LIFE INSURANCE—ARBITRARY CHANGE OF CONTRACT—ESTOPPEL OF MEMBER BY PAYMENT OF ASSESSMENTS.

A member of a fraternal insurance association, which passed an invalid by-law attempting to arbitrarily reduce the amount payable on the certificates of its members on their death, did not assent to such reduction, nor preclude the beneficiary from recovering the full amount named in his certificate on his death, by paying the reduced assessments after notice of the adoption of the by-law, where the association refused to receive any larger payments, and where, on making the first payment, he notified the association by letter that he did not ratify or consent to the reduction.

¶ 1. See note at end of case.

2. SAME—ACTION ON POLICY—EVIDENCE.

Where it was shown that the deceased wrote the letter giving such notice to the association, and made a press copy of the same, which he gave to plaintiff, and there was evidence also tending to show that he mailed the letter with the assessment, and the association admitted the receipt of the assessment, and did not deny the receipt of the letter, it was not error to admit the press copy in evidence; the question whether the original was mailed, or not, being one for the jury.

3. SAME.

A letter written by the secretary of the association to a collector after the by-law went into effect, advising him that the association would not receive assessments in excess of those made under such by-law, and directing him to return the excess which he had accepted from certain members, was admissible in evidence to show the association's position, and to excuse the failure of deceased to tender amounts in excess of the assessments required under the by-law.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

J. H. Frantz (Wright & Frantz, of counsel), for plaintiff in error.
Chas. Hays Brown, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. Benjamin F. Champe became in September, 1881, a member of the fraternal and beneficial order known as the American Legion of Honor, and, as a "companion of the sixth degree," took and held, from that time on, a benefit certificate or insurance policy of \$5,000, payable on his death to his wife, the plaintiff below. He died January 8, 1902, and this suit was to collect the full amount due on this certificate. The defendant below, having tendered \$2,000 when the proofs of death were filed, resisted the payment of any further amount on the ground that in August, 1900, at a meeting of the supreme council of the order, at which the deceased member was present by the representatives from his state, a by-law, known as "By-Law 55," was adopted, which reduced the amount to be paid on any benefit certificate of more than \$2,000, whether theretofore or thereafter issued, to \$2,000, and that the deceased, being duly notified of the passage of this by-law, agreed to and acquiesced in the same, and from October 1, 1900, when it took effect, paid his dues and assessments on the basis of a \$2,000 certificate. For replication, the plaintiff below submitted that by-law 55 was illegal and void, and averred that her husband had never agreed to, or acquiesced in, the same, but had protested against the attempt to cut down his policy without his consent, and had paid the assessments on the lower basis only because they were the only assessments he was required or permitted to pay. At the conclusion of the evidence, the court declined to direct a verdict for only \$2,000, and instructed the jury that by-law 55 was invalid and void, but left it to the jury to say whether the deceased member had agreed to, and acquiesced in, the change of his certificate from \$5,000 to \$2,000. The jury found in favor of the plaintiff for the full amount, and, the court having declined to set aside the judgment, the case is here on error; the assignments going to the refusal of the court to instruct as requested, and to the admission of certain testimony bearing upon the question of acquiescence.

The attempt of this order, by the passage of by-law 55, to reduce its certificates, and thus repudiate, in part, its obligations, has already been held to be in gross violation of the contractual rights of the members affected, and their beneficiaries, and therefore invalid and void. *Supreme Council of American Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153. An insurance certificate or policy is not a one-sided thing. It takes two to make it, and two to unmake it, and there are rights and obligations on both sides. Champe became a member of the Centennial Council of the order, at Nashville, in 1881, and at that time, when he was about 40 years old, took out the certificate for \$5,000 on his life. In March, 1897, the membership of the Centennial Council having dwindled below the number required to do business, Champe was transferred to the Alpha Council, of Boston, and, from that time on, paid his dues and assessments to it, through its collector. From September, 1881, to October, 1900, when by-law 55 went into effect, he paid his assessments on the \$5,000 basis. The last monthly assessment he paid was \$18.60. If the preceding assessments were the same, he had paid, not including dues, at the rate of \$223.20 a year, or, in the 19 years, over \$4,000. Having thus paid the order enough money to equal, with interest, the face of his \$5,000 certificate, the sole question submitted to the jury was whether, when notified of the passage of by-law 55, he agreed to, and acquiesced in, the invalid effort to cut his certificate 60 per cent., and pay his widow but \$2,000, although he had already paid the order more than \$4,000.

When Champe got the notice, in September, 1900, that by-law 55 had been passed, and future assessments would be received only on the \$2,000 basis, he was naturally deeply concerned (his health being then impaired); and he consulted his wife and brother-in-law, Stahlman, and, with their knowledge and approval, along with the new assessment of \$7.44 on the reduced basis, transmitted by mail (as plaintiff claimed) to the collector at Boston the following letter:

"Nashville, Tenn., Oct. 29, 1900.

"Mr. L. B. Poole, Collector A. L. of H., Boston, Mass.—Dear Sir: Enclosed find money order for \$7.44, being all that I am permitted to pay on my benefit certificate of \$5,000 (which I refuse to surrender). The payment being made upon the basis of \$2,000, but in paying it I do not ratify the action of the Supreme Council, A. L. of H., in reducing the amount of my benefit certificate of \$5,000 to \$2,000, but I pay the \$7.44, being all that I am required or permitted to pay.

"Very respectfully,
"Enc."

[Signed] B. F. Champe.

It was admitted by the defendant that on October 29, 1900, the date of the letter, there was issued to B. F. Champe, at Nashville, a money order for \$7.44, payable to "L. B. Poole, Collector A. L. of H., Boston, Mass."; and Miss Poole, the collector, testified she received this money order, but she was unable to say whether she did or did not receive the letter. She would not, however, swear that she did not receive it. Mrs. Champe testified that her husband brought her a press copy of the letter, the signature to which she identified as his, and told her that he had mailed it with the assessment. Stahlman testified that the deceased consulted him, that the letter was written in conformity with his suggestion, and that he saw the original. The

witness was quite sure that, when the deceased showed him the letter, he also showed him the post-office order which the letter called for, and that he enclosed the letter and post-office order in a stamped envelope, addressed to the collector at Boston, and sealed the same, going immediately after the interview direct to the post office to mail it. While the witness did not see the deceased mail the letter, the latter stated upon his return that he had mailed it, and some days thereafter showed the witness the card acknowledging the receipt of the post-office order for \$7.44. In view of these facts, we are unable to perceive any valid ground for the objection to the introduction of the press copy of the letter. Both Mrs. Champe and Stahlman testified that the deceased had consulted with them, and decided to send along with the assessment a letter protesting against the reduction of his certificate. Stahlman saw the original that was to be mailed. If the letter was mailed, and received, it was the fault of the defendant that it was not produced. The collector would not swear it was not received. In default of the original, the court properly permitted the press copy to go in. Whether the original was mailed, or not, was a question for the jury.

It is also urged the court erred in admitting a letter written by the supreme secretary of the order to the collector of the council at Knoxville. This letter was written November 8, 1900, immediately after the receipt of the first assessment collected under by-law 55. The collector at Knoxville had accepted and transmitted certain assessments in excess of what was due on the \$2,000 basis. The letter denounced his action as illegal, and directed him to return the overpayments immediately; stating that, since the fixing of the maximum death benefit at \$2,000, assessments in excess could not be accepted. The letter was introduced solely to show the position taken by the general council with respect to the receipt of assessments after by-law 55 went into effect. The court did not err in admitting it. Such being the rule laid down by the supreme authority of the order, it was not necessary, and would have been a vain thing, for the deceased to tender amounts in excess of the assessments required. Supreme Council, A. L. of H., v. Orcutt, 119 Fed., 682, 687, 56 C. C. A. 294.

The judgment of the court below is affirmed.

NOTE.

Mutual Benefit Insurance Contracts as Affected by Subsequent Provisions and Amendments of Charter, Constitution, or By-Laws.

I. IN GENERAL.

[a] (U. S. 1900) The legislative acts of a private corporation, like those of a public body, are presumed to be intended to operate prospectively only; and amendments to its constitution adopted by an assessment insurance corporation, which, if given a retrospective operation, would change the contracts made by its outstanding certificates or policies by reducing the amounts payable thereunder by their plain terms, will be construed as intended to affect only policies subsequently issued, unless there are imperative reasons which forbid such construction.—Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93.

[b] (Ga. 1901) Though the application and certificate of membership in a mutual insurance order both stipulate that the right of the member to participate in the benefit fund is expressly conditioned on his compliance with all the laws, regulations, and requirements which are or may be enacted by the order, a by-law enacted subsequent to the issuance of the certificate will be given a prospective operation, in the absence of a clear intent that it shall act retroactively.—*Ancient Order United Workmen v. Brown*, 37 S. E. 890, 112 Ga. 545.

[c] (Ill. 1891) Where the by-laws in force when a member obtained his certificate are afterwards amended at a meeting which he did not attend, such amendments are not binding on him unless it is affirmatively shown that the meeting was called in the manner provided by the constitution.—*Metropolitan Safety Fund Acc. Ass'n v. Windover*, 137 Ill. 417, 27 N. E. 538, affirming (1890) 37 Ill. App. 170.

[d] (Ill. 1893) Where a certificate of membership in a mutual benefit association provides that the certificate holder shall pay a mortuary assessment on the death of each member of one dollar, or such proportional part thereof as may be necessary to raise the sum required to pay the claim, and the certificate also states that the application for membership and the certificate shall constitute the complete and only contract between the member and the association, a failure on the part of a certificate holder to pay an assessment levied by the association does not constitute a breach of the conditions of the certificate where the member has, in obedience to the by-laws of the association, already paid other assessments sufficient to raise the sum required for the payment of all claims due from the association, since the association, having made a contract with the member, cannot, by its by-laws, change such contract.—*Covenant Mut. Ben. Ass'n v. Baldwin*, 49 Ill. App. 203.

[e] (Ill. 1898) Recovery on a certificate of insurance issued by a fraternal benefit association cannot be governed by laws passed subsequent to its issuance.—*Moore v. Chicago Guaranty Fund Life Soc.*, 76 Ill. App. 433.

[f] (Iowa, 1896) Where a policy provided that insured may, within 15 days after his assessment becomes due and unpaid, be reinstated by the payment of the assessment and a fine, the insurer cannot alter the contract by the subsequent adoption of a by-law providing for such reinstatement on condition that insured was then in good health.—*Selvarts v. National Ben. Ass'n of Minneapolis*, 95 Iowa, 710, 64 N. W. 671.

[g] (Iowa, 1898) The articles of incorporation of an accident insurance association provided for liability on a more limited class of deaths than was provided for in the constitution and by-laws as they existed before the incorporation. Nothing in such constitution authorized the association to amend it so as to bind a member to any change in his contract without his assent, and the amended articles did not purport to change existing contracts. *Held*, that the liability of the association on a certificate of membership issued before the amendment is to be determined according to the constitution as it existed when the certificate was issued.—*Carnes v. Iowa Traveling Men's Ass'n*, 76 N. W. 683, 106 Iowa, 281, 68 Am. St. Rep. 306.

[h] (Mich. 1896) By-laws of a mutual benefit society, giving it 90 days after maturity of benefit certificates in which to pay losses, and forbidding transfers of membership certificates, do not affect the rights of holders of certificates issued before such by-laws were passed.—*Wheeler v. Supreme Sitting of Order of Iron Hall*, 110 Mich. 437, 68 N. W. 229.

[i] (Minn. 1899) By-laws in operation when a member enters a beneficial insurance association may be reasonable and valid as to him, on the ground of his having assented thereto when accepting membership, and yet be unreasonable and invalid as to the present members when adopted as changes and amendments to existing by-laws, such members not having assented thereto in any manner.—*Thibert v. Supreme Lodge Knights of Honor*, 81 N. W. 220, 78 Minn. 448, 47 L. R. A. 136, 79 Am. St. Rep. 412.

[j] (Minn. 1899) When T. became a member of a subordinate lodge, and received a beneficial insurance certificate from defendant corporation, he was entitled, under the by-laws, to written or printed notice from the reporter of such lodge, dated on the 1st day of the month, in case the assessments and levies for such month for the payment of death claims exceeded or were less

than two in number. Subsequently the lawmaking body abrogated the provision, and enacted that on or before the last day of each month every member should pay the amount of each assessment levied, and, failing to pay, should stand suspended, and not entitled to the benefits of the insurance fund. It was further provided in the amended by-laws that: "Each subordinate lodge may, at its option, provide for notification to its members of the number of assessments thus levied, which may be by written or printed notice, or by newspaper containing the supreme reporter's official notice of such levy, mailed or personally delivered to the members; but no failure on the part of such lodge to give notice to members, or failure to receive such notice, shall operate to relieve from suspension any member who shall fail to pay the assessments as required by section 7 of this article." It was not shown that T. had any knowledge of the change when he died, November 19, 1893, not having paid any part of three assessments levied and payable on or before the last day of October. *Held* that, as to him, the change and amendment in the by-law in force when he became a member was unreasonable and of no effect, and that it is immaterial that under the by-law above quoted the subordinate lodge had designated a newspaper for the publication of notices, in which notice of these assessments had been published, and that a copy of such paper had been duly mailed to T.—*Thibert v. Supreme Lodge Knights of Honor*, 81 N. W. 220, 78 Minn. 448, 47 L. R. A. 136, 79 Am. St. Rep. 412.

[k] (Miss. 1902) In reply to questions in the application, insured stated that he had never been successfully vaccinated, and waived claim under the certificate, should his death result from smallpox. At the time of his death the constitution and by-laws had been amended so as to substitute for such second question one requiring an applicant who had not been successfully vaccinated to waive claim for death from smallpox until he had been successfully vaccinated. *Held* that, on the death of insured from smallpox after the amendment, the beneficiary could recover under the certificate; insured having been successfully vaccinated meanwhile.—*Sovereign Camp Woodmen of the World v. Woodruff*, 32 South. 4, 80 Miss. 546.

[l] (Mo. 1898) A by-law of a mutual company providing for a separate assessment in separate jurisdictions, but making no division of territory into separate jurisdictions, is not annulled by a later by-law making a division of territory creating separate jurisdictions, although the latter is a complete set of laws in itself, and they will be considered together in the construction of a contract made prior to the enactment of both.—*Brower v. Supreme Lodge Nat. Reserve Ass'n*, 74 Mo. App. 490.

[m] (Neb. 1903) Comp. St. 1901, c. 43, § 112, providing that amendments and alterations in constitutions and by-laws of fraternal associations, duly certified, must be filed with the Auditor of Public Accounts, is not unconstitutional as impairing the obligation of contracts with respect to pre-existing instruments.—*Knights of Maccabees of the World v. Nitsch*, 95 N. W. 626.

[n] (Neb. 1903) Mutual insurance companies are self-governing bodies, and the court will interfere on an amendment to their constitution only when it is unfair or disturbs vested rights.—*Hall v. Western Travelers' Acc. Ass'n*, 96 N. W. 170.

[o] (N. J. 1896) A member cannot be deprived of his right to a weekly allowance in sickness by a change in the articles of the association, made contrary to the provisions of the by-laws and constitution.—*Mutual Aid & Instruction Soc. v. Monti*, 36 Atl. 666, 59 N. J. Law, 341.

[p] (N. Y. 1888) Where by-laws in force at the time a person becomes a member of a mutual benefit society provided for amendments thereto, the members are bound by the amendments.—*May v. New York Safety Reserve Fund Soc.*, 14 Daly, 389.

[q] (N. Y. 1897) An amendment of the by-laws cannot make past acts of a member a bar to the right to benefits, though the constitution reserves to the association the right to amend its by-laws, since such an amendment is not reasonable.—*Grafstrom v. Frost Council*, No. 21, Order of Chosen Friends (Sup.) 43 N. Y. Supp. 266, 19 Misc. Rep. 180.

[r] (N. Y. 1901) The gratuity fund, by assessments and other appropriations of money, had accumulated for the benefit of the beneficiaries designated in the charter. The by-laws were subsequently amended so as to provide that the

fund might be converted into cash, and be distributed, less the expenses connected therewith, among the living subscribing members. *Held*, that the amendment was void, as diverting the fund to a different use, and destroying the rights of members secured by the by-laws, on which they rely when they enter into the contract, and also because it diverts the fund to a use not authorized by the charter. Judgment (Sup.) 69 N. Y. Supp. 764, affirmed.—*Parish v. New York Produce Exchange*, 61 N. E. 977, 169 N. Y. 34.

[s] (N. Y. 1901) The New York Produce Exchange, a corporation organized for commercial purposes, under an amendment to its charter, and by-laws enacted to carry the amendment into effect, created a gratuity fund for the benefit of the widows and families of its deceased members; the by-laws to be operative only on such of the then existing members as should agree and consent thereto. *Held*, that the rights and obligations of an existing member who should agree with the exchange and with the other members that on the death of each subscribing and future member he would pay an assessment as provided by the by-laws rested on the contract as interpreted by the charter and the by-laws, and the corporation could, by reasonable amendment, alter the by-laws, provided they did not impair the vested rights of the members. Judgment (Sup.) 69 N. Y. Supp. 764, affirmed.—*Parish v. New York Produce Exchange*, 61 N. E. 977, 169 N. Y. 34.

[t] (N. Y. 1902) Where an application for a beneficiary certificate in a mutual benefit association stated that the application, in connection with the constitution of the association, should form the basis of the contract, the rights of the beneficiary were subject to limitation by any subsequent reasonable amendment to the constitution.—*Beach v. Supreme Tent Knights of Macca-bees of the World*, 77 N. Y. Supp. 770, 74 App. Div. 527.

[u] (N. Y. 1902) A change in the by-laws of an assessment insurance association provided for the payment of the full face value of certificates, but especially excepted certificates issued before a certain date. *Held* that, whether the new by-laws were void or valid, a beneficiary under an old certificate, who received the full amount called for by the old by-laws, could not complain, since her rights were, in either event, relegated thereto.—*Evans v. Southern Tier Masonic Relief Ass'n*, 78 N. Y. Supp. 611, 76 App. Div. 151.

[v] (N. Y. 1903) A member of a mutual benefit association agreed to comply with all the laws and regulations "now in force or that may hereafter be enacted." *Held*, that by-laws regularly adopted thereafter were retrospective as to their operation, except as to rights fixed by the terms of the original contract. Judgment (1901) 73 N. Y. Supp. 594, 66 App. Div. 448, modified.—*Shipman v. Protected Home Circle*, 67 N. E. 83, 174 N. Y. 398.

[w] (N. Y. 1903) A member, on joining a fraternal association, obligated himself "to conform * * * to the laws, rules, and usages of the order * * * which may hereafter be adopted." His certificate of beneficial membership provided that, "in consideration of the full compliance with all by-laws * * * now existing or hereafter adopted," etc. After the member's admission the association adopted a by-law providing for a limiting of the liability of the company "in case the member shall die by suicide, sane or insane, or by alcoholism, or by legal execution for crime." *Held* that, since the by-law was not expressly made retroactive, it would not be so construed. Judgment (1902) 75 N. Y. Supp. 805, 37 Misc. Rep. 406, affirmed.—*Bottjer v. Supreme Council American Legion of Honor*, 79 N. Y. Supp. 684, 78 App. Div. 546.

[x] (N. Y. 1903) A member, on joining a fraternal association, obligated himself "to conform * * * to the laws, rules, and usages of the order * * * which may hereafter be adopted." His certificate of beneficial membership provided that "in consideration of the full compliance with all by-laws * * * now existing or hereafter adopted," etc. After the member's admission the association adopted a by-law providing for a limiting of the liability of the company "in case the member shall die by suicide, sane or insane, or by alcoholism, or by legal execution for crime." *Held*, that the by-law did not affect rights under the certificate, since it was unfair and unreasonable, and not in accordance with the charitable objects of its organization. Judgment (1902) 75 N. Y. Supp. 805, 37 Misc. Rep. 406, affirmed.—*Bottjer v. Supreme Council American Legion of Honor*, 79 N. Y. Supp. 684, 78 App. Div. 546.

[y] (Tex. 1899) Where plaintiff's evidence showed that certain provisions of the society's constitution, relied on as a defense to a policy, were not in force when the policy was issued, the direction of a verdict for defendant for want of proof of compliance with such provisions was properly refused.—*International Order of Twelve of the Knights and Daughters of Tabor v. Boswell*, 48 S. W. 1108.

[z] (Tex. 1899) A beneficial association first incorporated in Kentucky, but later abandoned its charter and obtained a charter in Missouri, and for many years, with the knowledge and recognition of the subordinate lodges and of deceased, continued to act under the later charter. *Held*, that the Missouri charter, and the constitution and by-laws enacted thereunder, controlled in determining the rights under deceased's certificate, though he had joined before the new charter was obtained.—*Bollman v. Supreme Lodge Knights of Honor*, 53 S. W. 722.

II. NECESSITY OF RESERVATION OF RIGHT OR OF CONSENT BY INSURED.

[a] (Ill. App. 1903) A member of a mutual benefit society is not bound by constitutional amendments or by-laws enacted after he becomes a member, in the absence of an express agreement to be so bound.—*National Council of Knights and Ladies of Security v. Dillon*, 108 Ill. App. 183.

[b] (Iowa, 1892) In an action on certificates of insurance it appeared that after the certificates were issued to the assured, and before his death, defendant's board of directors amended its articles of incorporation so as to provide for notice of assessments by mail. *Held*, that the assured was not bound by such amendment to the articles of incorporation where there was no evidence of acquiescence on his part.—*Courtney v. United States Masonic Ben. Ass'n*, 53 N. W. 238.

[c] (Kan. 1903) Before a mutual benefit association can amend its constitution, or adopt by-laws, so as to modify a contract of insurance, it must have expressly reserved such right, or have secured the express consent of the assured.—*Miller v. Tuttle*, 73 Pac. 88.

[d] (La. 1903) A benefit certificate, issued by a mutual aid association to a member, is a contract which can be changed only by consent of parties.—*Russ v. Supreme Council American Legion of Honor*, 34 South. 697, 110 La. 588.

[e] (Mo. 1891) A by-law of a mutual benefit society, adopted subsequently to the issue of a certificate, does not modify the contract of insurance without the express consent of the member, nor control the construction of the contract.—*Grand Lodge A. O. U. W. v. Sater*, 44 Mo. App. 445.

[f] (Mo. 1894) A mutual benefit society cannot affect the right of a member to benefits by amendment of its laws, unless his certificate was issued subject to a right of amendment.—*Chadwick v. Order of Triple Alliance*, 56 Mo. App. 463.

III. AGREEMENTS TO BE BOUND BY SUBSEQUENT CHANGES IN GENERAL.

[a] (U. S. 1902) An agreement in an application for a policy of insurance issued on the assessment plan, to abide by the constitution, rules, and regulations of the company as they then were or might be constitutionally changed thereafter, did not amount to a consent to such changes which on their face indicated that they applied only to policies thereafter to be issued. Judgment (1900) 104 Fed. 638, 44 C. C. A. 93, affirmed.—*Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 23 Sup. Ct. 108, 187 U. S. 197, 47 L. Ed. 139.

[b] (U. S. 1901) The general agreement of the members of a fraternal and insurance order, on joining the same, that they will be governed by the then existing laws of the order, and all future adopted amendments thereto, binds them only as to amendments and changes having relation to the organization generally, and does not amount to a reservation to the order of the right to alter the contract made by a member's insurance certificate without his consent, nor can such consent be implied from the fact that the body attempting to make such alterations is made up of representatives elected by the subordinate lodges. Judgment, *Getz v. Supreme Council American Legion of Honor (C. C.)* 109 Fed. 261, affirmed.—*Supreme Council American Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153.

[c] (U. S. 1899) A provision of a life insurance policy making it subject to the rules and regulations of the association issuing it then in force or that "might thereafter be enacted" gives the association the right to add new conditions to the contract by subsequent regulations, but it has no power to make such regulations retroactive, so as to render the policy forfeitable, or diminish the amount recoverable thereunder, because of acts done by the insured previous to their enactment.—*Lloyd v. Supreme Lodge Knights of Pythias*, 98 Fed. 66, 38 C. C. A. 654.

[d] (Ill. 1901) A benefit certificate provided that it was issued on the condition that the insured should comply with the constitution and by-laws, a copy of which was attached to the certificate. A clause of the constitution declared that the instrument might be amended at any time by a two-thirds vote. *Held*, that the clause merely declared the manner of exercise of the power of amendment, and was not an assent on the part of insured to a subsequent amendment, taking away his right to appoint by will a beneficiary other than the one named in the certificate.—*Peterson v. Gibson*, 61 N. E. 127, 191 Ill. 365, 54 L. R. A. 836.

[e] (Ill. 1898) Parties forming a fraternal benefit society have power to contract with reference to future by-laws or change of by-laws, and, if they do so contract, new or changed by-laws are enforceable against them, even if they increase the burden of some or all the members.—*Fullenwider v. Supreme Council of Royal League*, 73 Ill. App. 321.

[f] (Ill. 1899) A provision in an application for a certificate of insurance that all future legislation of the order shall constitute a part of the contract is valid, and a subsequently amended by-law is binding on both the member and his beneficiary.—*Supreme Tent Knights of Maccabees v. Hammers*, 81 Ill. App. 560.

[g] (Ill. 1899) Where the insured member of a mutual benefit association contracts, in joining it, that he and his beneficiary shall be bound by the by-laws of the order subsequently enacted, and will conform to all such by-laws, and that the same shall enter into and be a part of his contract, such contract is wholly within the control of the member, and his beneficiary is subject to every stipulation of the same.—*Supreme Tent Knights of Maccabees v. Hammers*, 81 Ill. App. 560.

[h] (Ill. 1900) Where the contract of a mutual insurance company contains an express provision reserving the right in the association to amend or change its by-laws, it will have the right so to do; and where, in a certificate of membership, it is provided that members shall be bound by the rules and regulations then governing the council or fund, or that might thereafter be enacted for such government, and such conditions are assented to, and the members accept the certificate upon such conditions, it is a sufficient reservation of the right in the society to amend its by-laws.—*Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309.

[i] (Ill. 1900) It is undoubtedly competent for parties to a mutual insurance association to make contracts with reference to the by-laws then existing, or which might thereafter be adopted; and, when such contracts are so made, such by-laws become a part of the contract.—*Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309.

[j] (Ill. 1902) Where a member of a beneficiary order contracts that he will be bound by the laws of the order which might afterwards be enacted, not only he, but also his beneficiary, is bound thereby.—*Supreme Tent Knights of Maccabees of the World v. Stensland*, 105 Ill. App. 267.

[k] (Iowa, 1903) Parties to a mutual benefit certificate may agree to be bound by after enacted by-laws.—*Ross v. Modern Brotherhood of America*, 95 N. W. 207, 120 Iowa, 692.

[l] (Iowa, 1903) A certificate in a mutual benefit society provided that the articles of incorporation, fundamental laws, by-laws, rules, and regulations then in force, or which might thereafter be adopted, should constitute the contract between the parties. A member secured accident insurance from the society, providing for the payment of a certain indemnity for a broken arm or leg. At the time there was no by-law defining a broken arm or leg, but subsequently a by-law was passed providing that the breaking of a leg is defined to be the breaking of the shaft of the thigh-bone between the hip and the knee

joints, or the breaking of the shafts of both bones between the knee and ankle joints. *Held*, that the by-law was reasonable, and governed an injury to the certificate holder occurring after it was passed.—*Ross v. Modern Brotherhood of America*, 95 N. W. 207, 120 Iowa, 692.

[m] (Kan. 1903) Neither a stipulation in an application for insurance in a benefit association to faithfully abide by the rules and regulations of the association, nor a statement in the certificate that it is issued on condition that insured shall, while a member, comply with all the laws of the association, confers authority on a mutual benefit association to amend its constitution or by-laws, so as to change the insurance contract.—*Miller v. Tuttle*, 73 Pac. 88.

[n] (Mo. 1903) Provision in the application and certificate of a member of a beneficial association that he accepts the certificate subject to all future laws of the association, renders binding on him only after-adopted laws for the conduct of the association, duties of members, and the like, and not such as impair his contract of insurance.—*Campbell v. American Ben. Club Fraternity*, 73 S. W. 342, 100 Mo. App. 249.

[o] (Mo. 1904) A member of a benefit association is not bound by an amendment to its constitution, passed after he received his benefit certificate, limiting his right to recover in case of injury, unless he expressly consented thereto, though his certificate states that it is issued on condition that he comply with the constitution then in force or thereafter to be enacted; such provision relating only to his duties as a member of the association.—*Sisson v. Supreme Court of Honor*, 78 S. W. 297.

[p] (Neb. 1903) A member of a mutual insurance company, accepting membership subject to the constitution as it may thereafter be, is bound by a reasonable amendment subsequently adopted.—*Hall v. Western Travelers' Acc. Ass'n*, 96 N. W. 170.

[q] (Neb. 1903) Where, after insured had become a member of a mutual benefit insurance association, under an agreement providing for amendments to the constitution, and thereafter the constitution was amended, exempting the company from liability for injuries caused by vertigo, and subsequently the insured fell in a fit of vertigo, receiving bodily injuries, the amendment was reasonable and binding, and the insured could not recover.—*Hall v. Western Travelers' Acc. Ass'n*, 96 N. W. 170.

[r] (N. H. 1895) Where, in an application for a certificate in a benefit society, the applicant agrees to conform to the laws, rules, and usages of the society then in force, or which might thereafter be adopted, and the certificate is issued upon condition that he comply with the laws then in force, or that might thereafter be enacted by the supreme council, any future enactments changing the rules are binding, if they are reasonable and are within the laws of the society.—*Supreme Council American Legion of Honor v. Adams*, 44 Atl. 380, 68 N. H. 236.

[s] (N. Y. 1900) Where insured agreed, in his application to join a mutual insurance company, to comply with its constitution, laws, and regulations, which were or might thereafter be enacted by the supreme, grand, or subordinate lodge, and his certificate of insurance contained a requirement that he must comply with all the laws, rules, and requirements of the grand lodge, the contention that the certificate comprised the whole contract between the insured and the company, and that therefore he was not bound by a subsequent amendment to the constitution, was without merit, since the certificate must be read in connection with the application for membership and the charter of the association.—*People v. Grand Lodge A. O. U. W. of New York*, 67 N. Y. Supp. 330, 32 Misc. Rep. 528.

[t] (N. Y. 1901) Where a member of a benefit order agreed to comply with all laws that might thereafter be adopted, such agreement did not permit changes which would impair the substance of the benefit certificate.—*Langan v. American Legion of Honor*, 70 N. Y. Supp. 663, 34 Misc. Rep. 629.

[u] (N. Y. 1902) Where an applicant for life insurance in an assessment association agreed to be bound by any by-laws "now in force or which may hereafter be adopted," a change in the by-laws, though made after the issuance of his certificate, became a part of the contract.—*Evans v. Southern Tier Masonic Relief Ass'n*, 78 N. Y. Supp. 611, 76 App. Div. 151.

[v] (N. Y. 1903) A corporation was organized under Laws 1874, c. 86, its

object, as prescribed by its charter, being to provide an exchange for merchants engaged principally in the butter, cheese, and egg business. By Laws 1882, c. 302, its charter was amended so as to add provision for the widows and families of deceased members. The members were then divided into two classes, one participating in its beneficiary provisions and one nonparticipating. By the act under which the company was incorporated it was authorized to adopt by-laws, and change them from time to time, and all applicants for membership stipulated that their rights were subject to future amendments of the by-laws. The benefit fund paid to the widows and families of deceased members consisted of the amount raised by an assessment of \$3 at each death on all participating members. Many of the participating members became dissatisfied, and were rapidly withdrawing, when the by-laws were amended so as to authorize participating members to change to the nonparticipating class on payment of all assessments due. *Held*, that the corporation had the right to adopt such amendment, and that it was reasonable.—*French v. New York Mercantile Exch.*, 80 N. Y. Supp. 312, 80 App. Div. 131.

[w] (Pa. 1901) Where a contract of insurance is issued, conditioned that it shall be subject to such by-laws as may be enacted by the society, by-laws subsequently passed become a part of the contract.—*Reynolds v. Supreme Conclave Improved Order of Heptasophs*, 18 Lanc. Law Rev. 125, 24 Pa. Co. Ct. R. 638, 14 York Leg. Rec. 185.

[x] (Tex. 1899) Insured, in his application for membership in a mutual benefit life insurance society, agreed to conform to the laws, rules, and usages of the order then in force, or which might thereafter be adopted. The by-laws were thereafter amended so as to decrease the amount his beneficiary would receive, and also to decrease the amount of the dues, but provided that members admitted before a certain date, to which class insured belonged, might, by a declaration in writing of such election, remain under the former plan. Insured did not make such declaration. *Held*, that he was bound by the change, and that his beneficiary had no such vested right in the certificate that it could not be affected by the change.—*Duer v. Supreme Council Order of Chosen Friends*, 52 S. W. 109, 21 Tex. Civ. App. 493.

IV. PROVISIONS RELATING TO ASSESSMENTS.

[a] (Ill. 1899) Where a member of a fraternal organization accepted a membership certificate which provided that he should comply with the rules then governing the benefit fund, or thereafter to be enacted, he was bound by a by-law, subsequently passed without fraud or improper motives, and in accordance with the constitution, which increased his assessments; he having no vested right to insurance at the former rate. Decree (1897) 73 Ill. App. 321, affirmed.—*Fullenwider v. Supreme Council Royal League*, 64 N. E. 485, 180 Ill. 621.

[b] (Mass. 1902) Under St. 1901, c. 422, §§ 5, 11, authorizing fraternal beneficiary associations to prescribe the mode of assessments for death benefits, a fraternal beneficiary association whose certificates of membership make no mention of the rates of assessment, and are expressly conditioned upon compliance by the members "with all the laws, rules, and requirements" of the order, may change its mode of assessment from the level assessment plan, in which all members paid alike, to a plan based upon the classification of the members according to age, without affecting any contractual rights of such members, although prior statutes (Pub. St. c. 115, § 8 et seq.) may have contemplated the level assessment plan.—*Messer v. Ancient Order of United Workmen*, 62 N. E. 252, 180 Mass. 321.

[c] (Mo. 1903) A mutual benefit certificate provided that on the death of the assured the association would pay to his beneficiary the amount of one assessment, not exceeding \$2,000, if the insured had complied with the charter, constitution, etc. It also provided that the express condition upon which it was issued was that the beneficiary's rights should be determined by the charter, constitution, laws, rules, and regulations of the order in force at the time the sum thereunder was payable. Afterwards the association adopted a by-law providing that a sum equal to one-fourth of the certificate must be paid by the member in assessments, failing which the deficit would be deducted from the

face value of the certificate. *Held* that, as the certificate contemplated the modification of the parties' rights by subsequent by-laws, the change was within the power of the association, though the insured's consent was not obtained.—*Richmond v. Supreme Lodge Order of Mutual Protection*, 71 S. W. 736, 100 Mo. App. 8.

[d] (N. C. 1901) A mere general consent, given by a member of a mutual benefit association, that its constitution and by-laws may be amended, does not authorize such a change in its rules as will destroy his vested rights under his insurance contract by subjecting him to pay a greater rate of assessment than the contract calls for. Rehearing (1900) 36 S. E. 352, 126 N. C. 971, denied.—*Strauss v. Mutual Reserve Fund Life Ass'n*, 39 S. E. 55, 128 N. C. 465.

V. PROVISIONS RELATING TO BENEFITS.

[a] (U. S. 1899) Where, after the issuance of a life policy, its conditions were changed, as therein provided might be done, by a by-law enacted by the association reducing the amount recoverable thereon in case the death of the insured should be caused or superinduced by the use of intoxicating liquors, the question whether the amount recoverable on the subsequent death of the insured, admitted to have been superinduced by the use of intoxicating liquors, is affected by such by-law, becomes one of fact, depending on whether the disease causing his death became seated in fatal and incurable form before or after the by-law took effect.—*Lloyd v. Supreme Lodge Knights of Pythias*, 98 Fed. 66, 38 C. C. A. 654.

[b] (U. S. 1900) A clause in an application for a policy of life insurance in a mutual assessment company, that the applicant agrees, if accepted, "to abide by the constitution, rules, and regulations of the company, as they now are, or may be constitutionally changed hereafter," cannot be reasonably construed as giving his assent in advance to any change which the company may see fit to make in its constitution or laws in the future which materially lessens the value of his policy, by reducing the amount of indemnity which by its terms the company promised to pay; nor will it have the effect of rendering such action binding upon him or the beneficiary in his policy.—*Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 104 Fed. 638, 44 C. C. A. 93.

[c] (U. S. 1901) Under the law of Pennsylvania, as settled by decision, a fraternal insurance society has no power to arbitrarily reduce the amount which it has contracted to pay to the beneficiary of a member on his decease from \$5,000 to \$2,000, by an amendment to its by-laws declaring that \$2,000 shall be the highest amount paid on any benefit certificate theretofore or thereafter issued. Judgment, *Getz v. Supreme Council American Legion of Honor* (C. C.) 109 Fed. 261, affirmed.—*Supreme Council of American Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153.

[d] (Cal. 1890) Where both the general laws of the state and the by-laws of an incorporated society give it the right to repeal, alter, or amend its by-laws, it is not a breach of contract for such society to amend a by-law which provides that, in case of sickness, a member shall be entitled to receive \$10 per week, by limiting such allowance to a certain number of weeks thereafter, though a member be sick at the time of such amendment.—*Stohr v. San Francisco Musical Fund Soc.*, 82 Cal. 557, 22 Pac. 1125.

[e] (Cal. 1893) Where a certificate in a mutual benefit society provides for its payment "in an amount to be computed according to the laws" of the society, and these latter provide that their provisions in regard to the payment of such certificates may be changed at any time, a member is bound by a change made in such laws after his procurement of the certificate, and before the time for its payment.—*Bowie v. Grand Lodge of Legion of the West*, 99 Cal. 392, 34 Pac. 103.

[f] (Cal. 1901) Where a member of a fraternal insurance society had been paid \$10 per week for more than 100 weeks, as provided by the by-laws thereof, and the society amended the by-laws so as to give sick members "\$10 per week for the first 50 weeks; for the following 50 weeks, \$5 per week; and thereafter, \$3 per week"—such amendment had no retroactive effect as to such member, who would therefore be entitled to weekly benefits as though he had not previously been sick.—*Berlin v. Eureka Lodge, No. 9, K. P.*, 64 Pac. 254, 132 Cal. 294.

[g] (Ga. 1903) A certificate issued by a benefit society provided that on compliance with all its by-laws, then existing or thereafter adopted, the society agreed to pay certain named beneficiaries \$5,000. Thereafter a by-law was adopted providing that \$2,000 should be the highest amount paid on any benefit certificate theretofore or thereafter issued. *Held*, that the agreement to pay \$5,000 was a contract, which could not be changed by a by-law, so as to reduce the amount agreed to be paid.—Supreme Council American Legion of Honor v. Jordan, 45 S. E. 33, 117 Ga. 808.

[h] (Ind. 1889) Deceased held a certificate in the insurance department of an order to which he belonged. The plan of the second rank, of which he was one, provided that members should be assessed \$1 at each death of a member, the fund thus raised being applicable only to losses in that rank. The certificate stipulated that it should be governed by the laws of the order then in force or thereafter enacted, and the constitution provided that it and the by-laws should be amendable by the supreme lodge. Deceased's certificate stipulated for the payment on his death to plaintiff of \$2,000, or, if there should be less than 2,000 members of that rank, then only \$1 for each member. The number of members increased to 16,000, when, by an amendment of the constitution and by-laws, a new rank was established with an assessment based on life expectancy, which was preferable to the second rank for young, but more expensive for old, men, and the younger members of the second rank were transferred, so that at deceased's death, three years later, only 173 members of the second rank remained; he having in the nine years of his membership paid in \$240. The new scheme was adopted in good faith, to benefit the order in general. Both deceased and plaintiff, upon learning of the new scheme, notified the supreme lodge that they protested against it. *Held*, that the change was not a violation of the contract, but within the scope of defendant's powers, and that plaintiff could recover only \$173 on the certificate.—Supreme Lodge K. P. v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

[i] (Ind. 1889) If the acts of defendant in depleting the rank to which deceased belonged were a breach of the contract of insurance, only nominal damages would be recoverable, as the loss occasioned thereby would be so remote and conjectural as not to form the basis of a recovery.—Supreme Lodge K. P. v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

[j] (La. 1903) A clause in a mutual benefit certificate, by which the party agrees to comply with all the by-laws of the association now existing or hereafter adopted, does not authorize the association to reduce the amount stipulated in the certificate to be paid.—Russ v. Supreme Council American Legion of Honor, 34 South. 697, 110 La. 588.

[k] (Mass. 1902) A life certificate entitling the beneficiary to a certain sum on the happening of certain conditions, and in consideration of a compliance by the insured with all the by-laws existing at the date of the certificate, or thereafter adopted, does not authorize the company to reduce the face of the certificate by subsequent by-laws providing that certificates shall not exceed a certain sum, or to so provide for the deduction of a percentage therefrom as an emergency fund, when the provision requiring compliance with the by-laws only refers to by-laws requiring payment of assessments, and deduction of advances for sick and disability benefits in accordance therewith.—Newhall v. Supreme Council American Legion of Honor, 63 N. E. 1, 181 Mass. 111.

[l] (Mich. 1902) Deceased was a member of a beneficiary association organized under How. Ann. St. c. 165, which authorized its trustees to change its by-laws. After deceased became a member the trustees adopted an amendment to the by-laws changing the schedule of benefits and increasing the membership dues. A member of the association testified that deceased had told him that he was satisfied with the changed schedule of benefits, and it appeared that he paid without protest the assessments and increased dues levied under the amended by-laws. *Held* sufficient to sustain a finding that deceased had waived his right to object to the amendment so as to be bound thereby.—Pokrefsky v. Detroit Firemen's Fund Ass'n, 90 N. W. 689, 131 Mich. 38.

[m] (N. Y. 1881) A benevolent association cannot reduce the amount of sick benefits to which a member is entitled by an amendment to its by-laws, after his disability has occurred and while he is in receipt of the weekly sum al-

lowed him, though its by-laws empower it to alter or amend them whenever deemed expedient.—*Poultney v. Bachman*, 62 How. Prac. 466.

[mm] (N. Y. 1881) At the time plaintiff joined a benevolent association, its constitution provided for the payment of a weekly sum to sick members. Thereafter this provision was suspended by a resolution offered and adopted as required for the amendment of the constitution. *Held*, that plaintiff's right to receive weekly sick benefits was taken away by the limitation or suspension of the provision authorizing them, though no notice of the proposed resolution was given him.—*McCable v. Father Matthew Total Abstinence Ben. Soc.*, 24 Hun, 149.

[n] (N. Y. 1901) Where an agreement of a benefit company is broken by reduction of the face of the benefit certificate from \$5,000 to \$2,000, and the member is not reinsured or reinsurable, the measure of damages is the present value of the policy, less the present value of the assessments which the member would have had to pay had there been no breach.—*Langan v. American Legion of Honor*, 70 N. Y. Supp. 663, 34 Misc. Rep. 629.

[o] (N. Y. 1901) In a contract between a benefit order and a member, where power to alter it in substance has not been reserved either in the act under which the order was incorporated, its constitution and by-laws, or the application for membership, a subsequent by-law reducing the face of the certificate is void, and a breach of the contract, for which the benefit order is liable.—*Langan v. American Legion of Honor*, 70 N. Y. Supp. 663, 34 Misc. Rep. 629.

[p] (N. Y. 1902) A certificate in a mutual benefit association entitled the beneficiary to a cash payment of \$1,000 in case of total "or" permanent disability. Eight years after the issuance of the certificate the constitution was amended so as to require the disability to be total "and" permanent, and to entitle the beneficiary only to annual payments of \$100 for ten years. *Held*, that a finding that the amendment was unreasonable was justified.—*Beach v. Supreme Tent Knights of Maccabees of the World*, 77 N. Y. Supp. 770, 74 App. Div. 527.

[q] (N. Y. 1902) An insured in an assessment life insurance association agreed in his application to be bound by all changes in the by-laws. Having notice both by presumption and a changed method of assessment, of a change in the by-laws, whereby beneficiaries received a pro rata share of a monthly assessment, instead of each certificate being paid or partially paid by an assessment levied for it alone, he continued to the time of his death, without dissent, to pay his assessments under the new by-laws. *Held*, that he would be deemed to have assented to the change in the by-laws.—*Evans v. Southern Tier Masonic Relief Ass'n*, 78 N. Y. Supp. 611, 76 App. Div. 151.

[r] (N. Y. 1903) A mutual benefit society issued a certificate agreeing to pay to the wife of the certificate holder a sum not exceeding \$5,000 on his death on condition that the certificate holder comply with the regulations of the association, or such as might thereafter be enacted. A by-law was subsequently passed which limited the highest amount payable on any certificate heretofore issued to \$2,000, and the company thereafter refused to receive demands and assessments on a basis of \$5,000 or to recognize the original contract of insurance as binding. *Held*, that the amended by-law was ineffectual to deprive the certificate holder of any vested rights, as it was beyond the power of the society to effect the obligation expressed in the certificate without the consent of its holder. Judgment (Sup. 1902) 75 N. Y. Supp. 1127, reversed.—*Langan v. Supreme Council American Legion of Honor*, 66 N. E. 932, 174 N. Y. 266.

[s] (N. Y. 1903) A mutual benefit society issued a certificate agreeing to pay to the wife of the certificate holder a sum not exceeding \$5,000 on his death, on condition that the certificate holder comply with the regulations of the association, or such as might thereafter be enacted. A by-law was subsequently passed which limited the highest amount payable on any certificate "heretofore issued" to \$2,000, and the company thereafter refused to receive dues and assessments on a basis of \$5,000, or to recognize the original contract of insurance as binding. *Held* that, as the amended by-law was ineffectual to deprive the certificate holder of any vested rights, there was not such a breach of contract as to entitle the holder to sue for recovery of damages thereunder, but his remedy was to ask the intervention of a court of equity to compel the

association to live up to its contract. Judgment (Sup. 1902) 75 N. Y. Supp. 1127, reversed.—*Langan v. Supreme Council American Legion of Honor*, 66 N. E. 932, 174 N. Y. 266.

[t] (N. Y. 1903) A beneficial association may not, under the reserved power to amend and change its by-laws, by amending them to provide that not more than \$2,000 shall be paid on any benefit certificate, take away the vested right of a member to whom a certificate providing for a death benefit of \$5,000 has been issued, and who has paid assessments thereon, to continue his \$5,000 certificate.—*Williams v. Supreme Council American Legion of Honor*, 80 N. Y. Supp. 713, 80 App. Div. 402; *Barton v. Same*, Id.

[u] (N. Y. 1904) A certificate of membership in a benefit association provided that in case of disability, or on attaining 70 years of age, a member would be entitled to receive one-half of the endowment provided by the by-laws. Held an absolute contract to pay one-half of the amount of the certificate on disability as provided in the by-laws of the order, which could not be impaired by a subsequent by-law providing that any member who shall become totally and permanently disabled shall be entitled to receive one-tenth part of the amount of his benefit certificate, though the society reserved the right in its constitution to amend the by-laws governing the endowment fund. Judgment (1902) 77 N. Y. Supp. 770, 74 App. Div. 527, affirmed.—*Beach v. Supreme Tent of Knights of Maccabees of the World*, 69 N. E. 281, 177 N. Y. 100.

[v] (N. C. 1903) A mutual benefit insurance association cannot amend its by-laws so as to reduce the amount of a certificate without the insured's consent, and the fact that its promise is only to pay an indefinite sum not exceeding the amount named in the certificate is immaterial.—*Makely v. Supreme Council American Legion of Honor*, 45 S. E. 649, 133 N. C. 367.

[w] (Pa. 1895) A member of a benefit society who took a certificate, "subject to such laws, rules, and regulations as now exist or may hereafter be adopted by and governing" the society, under which she was to receive one-half the amount thereof in 12 years, "if living and in good standing," was not bound by a subsequent amendment of the by-laws which restricted the benefits to holders of certificates, both previously and subsequently issued, who should live to the expectation of life, and become totally disabled, and limiting the payment then to be made to 10 per cent. of the amount of the certificate.—*Hale v. Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066.

[x] (Tenn. 1901) The incorporation into an insurance certificate issued by a benevolent association of an existing by-law, whereby members agree to abide by all the laws then in force or that might thereafter be enacted, does not authorize the association by a subsequent by-law to reduce the amount of insurance guaranteed by such certificate, after the member has paid premiums for years on the certificate as originally issued.—*Gaut v. Supreme Council A. L. H.*, 64 S. W. 1070, 107 Tenn. 603, 55 L. R. A. 465.

[y] (Wis. 1902) Provision in the membership certificate of a benefit society that it shall be subject to changes in the by-laws, rules, and regulations allows only reasonable changes, which is not the case where a certificate calls for \$1,000 at death, and the member has paid assessments on that basis, and the change does away with certificates, and provides that a beneficiary at death of a member shall receive such amount as the member has paid in assessments.—*Wuerfler v. Trustees of Grand Grove of Wisconsin Order of Druids*, 92 N. W. 433, 116 Wis. 19, 96 Am. St. Rep. 940.

[z] (Can. 1899) A by-law of a mutual benefit society, increasing the amount payable at death of members, applies to those who were members at the time of its passage, as well as to those subsequently becoming such, especially where it is not accompanied by any change in the scale of weekly payments by either prior or subsequent members.—*Lavigne v. L'Union Mutuelle de Bienfaisance*, 16 Rap. Jud. Que. C. S. 588.

[zz] (Can. 1901) The holder of a beneficiary certificate in a fraternal society is bound by subsequent alterations in the rules, whereby the amount to which he is entitled is diminished, where in the contract of insurance to which he assented the company reserves the power to alter its rules and regulations in respect to the fund out of which his certificate is payable.—*Doidge v. Royal Templars (C. A.)* 4 Ont. Law Rep. 423.

VI. PROVISIONS RELATING TO ADJUSTMENT OF CLAIMS.

[a] (Mich. 1895) The articles of association of defendant order provided that the association could change its constitution and laws, and that members could receive a benefit, to be paid in such sums and at such times as may be provided by the laws governing such payment, or in the certificate of membership. A certificate provided that if the member should pay his assessments punctually, and maintain himself in good standing, he should be entitled to receive, etc., but with no time set for payment. Afterwards defendant order adopted a by-law providing that final benefits should be adjusted within 90 days, and that claims should be filed within 30 days from the expiration of the certificate. *Held*, that the by-law did not affect the time for bringing a suit on such certificate.—*Cohen v. Supreme Sitting of Order of Iron Hall*, 105 Mich. 283, 63 N. W. 304.

VII. PROVISIONS RELATING TO BENEFICIARIES.

[a] (Conn. 1899) Where one joins a beneficial association, agreeing to conform in all respects to the by-laws in force or to be adopted, he is bound by a subsequent by-law, duly adopted, changing the method of determining his beneficiary; and he has no vested right to have the fund disposed of as provided by the by-laws at the time of his admission.—*Masonic Mut. Ben. Ass'n v. Severson*, 43 Atl. 192, 71 Conn. 719.

[b] (Ill. 1893) An association amended its constitution, providing a mode by which members might designate their beneficiaries, and declaring that "where marriage is contracted after issuance of policy, and said policy becomes payable through death, it shall be paid to the widow, or, in event of her death, to their joint issue, if any, unless otherwise ordered." *Held*, that where a member had, before adoption of such amendment, designated his mother as his beneficiary, in the manner then provided by the constitution, the policy was payable to his mother, although he left a widow, whom he had married after issuance of the policy.—*Benton v. Brotherhood of Railroad Brakemen*, 146 Ill. 570, 34 N. E. 939, reversing (1892) 45 Ill. App. 112.

[c] (Ill. 1901) Where the act under which a beneficiary association is incorporated provides that the member may designate by will a beneficiary having no insurable interest in his life, a by-law providing that he cannot do so is clearly inconsistent with the constitution, as it impairs the obligation of the contract between the member and the association.—*Nelson v. Gibson*, 92 Ill. App. 595.

[d] (Mass. 1893) A mutual benefit certificate was issued to S., payable to defendant as a "dependent," while the company's laws provided that certificates should be paid to the member's family, "or as he may direct." The certificate recognized that changes might be made in the laws by which the holder would be bound, and afterwards the laws were so amended that payment of the benefit fund was limited to a member's family and persons dependent on him. Afterwards S., being notified of the change in the laws, made affidavit that defendant was a dependent, and the designation of her as beneficiary was not changed, but she in fact was not a dependent. *Held*, that defendant, not being a dependent, was not entitled to payment of the certificate.—*Sargent v. Supreme Lodge Knights of Honor*, 158 Mass. 557, 33 N. E. 650.

[e] (N. Y. 1890) A member of a mutual aid association directed, in accordance with its laws, that a benefit of \$1,000 on his death should be paid to his uncle and aunt. He afterwards married. A subsequent amendment of the laws of the association provided that such benefit should be paid, on the decease of a member—First, to the widow; second, to the children, if there be no widow; third, to the parents, if there be no widow or children; and empowered a member to designate any beneficiary; provided, that he must leave at least one-half thereof to the widow, if there be one, and, if not, then at least one-half to the children, if any. The member thereafter died leaving a widow, without having made any other designation. *Held*, that the widow took the whole fund, as the designation could not operate, under the laws as amended, not even to cut down her right to one-half of the fund.—*Sanger v. Rothschild*, 123 N. Y. 577, 26 N. E. 3, affirming (1888) 50 Hun, 157, 2 N. Y. Supp. 794.

[f] (N. Y. 1900) An insured designated certain beneficiaries, neither blood

relations nor dependent upon him, in accordance with the by-laws of the insurer, giving him the unrestricted right to designate the beneficiary. Subsequently the insurer, by amendment without a retroactive clause, required the beneficiary to be a blood relation or a dependent of the insured. *Held* not to affect the rights of the beneficiaries named, on the death of insured after the amendment. Judgment (Sup. 1897) 48 N. Y. Supp. 590, 22 Misc. Rep. 147, affirmed.—*Spencer v. Grand Lodge A. O. U. W. of State of New York*, 65 N. Y. Supp. 1146, 53 App. Div. 627.

[g] (N. Y. 1901) Where an applicant for membership and a beneficiary certificate in a lodge agrees in his application to comply with all laws and regulations that are or may be enacted by the grand lodge, an amendment of the by-laws by the grand lodge, providing that only persons of a certain class may be named as beneficiaries, will prevent a person not belonging to that class, who was named as a beneficiary prior to the amendment, from taking the amount due, since the amendment is a part of the contract between the member and the lodge.—*Roberts v. Grand Lodge A. O. U. W. of New York*, 68 N. Y. Supp. 949, 33 Misc. Rep. 536, judgment reversed 70 N. Y. Supp. 57, 60 App. Div. 259.

[h] (N. Y. 1901) When a member of a benefit society procures a policy for the benefit of a certain person, the status of the beneficiary cannot be changed by an alteration in the by-laws changing the manner of designating beneficiaries, and requiring that, unless a member who left no wife or child designated the beneficiary in a certain manner, no benefit should accrue, where the change was made after the member, who was unmarried, had become afflicted with progressive paresis, causing death; the amendment either being not retroactive as to him, or so unreasonable, because of his health, as not to apply to him.—*Grossmeyer v. District No. 1, I. O. B. B.*, 70 N. Y. Supp. 393, 34 Misc. Rep. 577.

[i] (N. Y. 1903) The constitution of a benevolent society provided that the applicant should state to whom the death benefit should be paid in case of his death. Decedent was a member prior to the adoption of such provision, and of another provision which excepted members of the order who were members entitled to the death benefit from the operation of the former provision. *Held* not to require the issuance by the society of a certificate designating the beneficiary, and showing that the member is entitled to the benefit, to one who was a member prior to such provision, as a condition precedent to an action to recover the same on his death. Judgment, *Pfeifer v. Supreme Lodge Bohemian Benev. Slavonian Soc. of United States* (Sup. 1902) 77 N. Y. Supp. 1138, 74 App. Div. 630, reversed.—*Pfeifer v. Supreme Lodge of Bohemian Slavonian Benev. Soc. of United States*, 68 N. E. 108, 173 N. Y. 418.

[j] (N. Y. 1903) An alteration of the by-laws of a benefit society, changing the manner of designating beneficiaries, and requiring, contrary to the former rule, that, unless a member who left no wife or child designated a beneficiary in a certain manner, no benefit should accrue, did not change the status of a member who was incapacitated by insanity from a compliance therewith, and remained so until his death. Judgment, *Grossmeyer v. District No. 1 Independent Order of B'nai Brith* (1902) 74 N. Y. Supp. 1057, 70 App. Div. 90, affirmed.—*Grossmeyer v. District No. 1 Independent Order of Benai Berith*, 67 N. E. 1083, 174 N. Y. 550.

[k] (N. Y. 1903) A mutual benefit certificate provided that on proof of permanent disability the member should be entitled to one-half the insurance, and that the member should have the right to change beneficiaries. A certificate was payable to the member's wife, and after her death was made payable to the second wife, who died before the member, no further change being made in the certificate. After the second wife was substituted as beneficiary the by-laws were changed, so as to provide that on the death of the beneficiary before the member the administrator of the beneficiary, instead of the administrator of the member, should be entitled to the proceeds of the certificate. *Held*, that neither the member nor the first wife had any vested interest in the certificate, so as to render the amended by-law void as to them. Judgment, 80 N. Y. Supp. 775, 81 App. Div. 1, affirmed.—*O'Brien v. Supreme Council Catholic Benev. Legion*, 68 N. E. 1120, 176 N. Y. 297.

[I] (N. Y. 1903) A mutual benefit certificate provided that on proof of permanent disability the member should be entitled to one-half the insurance, and that the member should have the right to change beneficiaries. A certificate was payable to the member's wife, and after her death was made payable to the second wife, who died before the member, no further change being made in the certificate. After the second wife was substituted as beneficiary the by-laws were changed, so as to provide that on the death of the beneficiary before the member the administrator of the beneficiary, instead of the administrator of the member, should be entitled to the proceeds of the certificate. *Held*, that neither the member nor the first wife had any vested interest in the certificate, so as to render the amended by-law void as to them.—*O'Brien v. Supreme Council Catholic Benev. Legion*, 80 N. Y. Supp. 775, 81 App. Div. 1.

[m] (Or. 1892) An application for admission to membership in a mutual benefit association provided that compliance by the applicant with all existing regulations of the order, and such as it should thereafter adopt, should be the condition upon which he should be entitled to benefits of the order. *Held*, that a subsequent amendment of the laws of the society, to the effect that each member "shall designate" the person to whom the beneficiary fund due at his death "shall be paid," who "shall in every instance" be a member of his family, a blood relation, or a person dependent upon him, was not retroactive in its effect, and did not require the substitution of such relation or dependent person for one who had been previously designated as beneficiary.—*Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603.

[n] (Or. 1892) An amendment of the rules of a mutual benefit association, made subsequent to decedent's admission, to the effect that each member should designate the person to whom the fund due at his death should be paid, who shall in every instance be a member of his family, a blood relation, or a person dependent on him, even if retroactive, did not apply to a member who had no family, blood relation, or person dependent on him; and his previously designated beneficiary was entitled to the fund.—*Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603.

[o] (Tex. 1899) A beneficial association first incorporated in Kentucky, but later abandoned its charter and obtained a charter in Missouri, and for many years, with the knowledge and recognition of the subordinate lodges and of deceased, continued to act under the later charter. *Held* that, conceding that the Kentucky charter and the laws enacted thereunder should control, the second charter would be in the nature of an amendment to the first; and as the first provided for amendment, and deceased, in his application, agreed to comply with future regulations, a change in the rule for determining beneficiaries was binding on him and on the beneficiaries.—*Bollman v. Supreme Lodge Knights of Honor*, 53 S. W. 722.

[p] (Tex. 1900) Where there was no law of defendant lodge restricting the right of a member to designate a beneficiary in his benefit certificate at the time the certificate in suit was taken out, a subsequent amendment to defendant's constitution limiting persons who could be beneficiaries to certain relatives of the member, which would exclude plaintiff, would not be construed so as to affect a member's certificate which had been previously issued, in the absence of express words requiring such construction.—*Grand Lodge A. O. U. W. v. Stumpf*, 58 S. W. 840, 24 Tex. Civ. App. 309.

VIII. PROVISIONS RELATING TO OCCUPATION OF BUSINESS OF INSURED.

[a] (Cal. 1902) Plaintiff's husband took out an endowment certificate in favor of plaintiff in the endowment rank of the Supreme Lodge Knights of Pythias of the World, agreeing to be governed by all the laws of such corporation then in force or thereafter enacted. Thereafter, without the knowledge of plaintiff's husband, and before the expiration of the charter of such corporation, the defendant, the Supreme Lodge Knights of Pythias, was incorporated by a special act of Congress, under which all the assets and obligations of the old corporation, including the certificate held by plaintiff's husband, were transferred to the new corporation, which thereafter received the dues paid on such certificate until the death of the insured. *Held*, that deceased was not bound by a law passed by defendant, without deceased's knowledge or consent, pro-

viding that active army service by any present or future member of the endowment rank should forfeit his certificate.—*Richter v. Supreme Lodge Knights of Pythias*, 69 Pac. 483, 137 Cal. 8.

[b] (Iowa, 1891) After the assured became a member, the association, by vote of its members, he being entitled to two votes, adopted a new article, declaring that members were allowed to engage in any lawful occupation, except extrahazardous ones, and defining that of car coupler to be extrahazardous. *Held*, that this did not become part of assured's contract, so as to work a forfeiture, by reason of his becoming a car coupler.—*Hobbs v. Iowa Mut. Ben. Ass'n*, 82 Iowa, 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299.

[c] (Minn. 1903) When a benefit certificate was issued, the applicant agreed to be bound by the rules and regulations then existing and those thereafter to be enacted. At such time he had the right to work as a freight brakeman. Thereafter defendant amended its by-laws to the effect that, if any member should become a freight brakeman, he should forfeit his certificate. No provision was made for notice of the change to pre-existing members. The insured was killed while a freight brakeman, without any notice thereof. *Held*, that the amendment was unreasonable and void as to the insured.—*Tebo v. Supreme Council of Royal Arcanum*, 93 N. W. 513, 89 Minn. 3.

[d] (Mo. 1894) A by-law of a Masonic mutual benefit society, passed in view of a by-law of the Masonic lodges excluding saloon keepers from the privileges of the lodges, and providing that any member becoming a saloon keeper shall forfeit his membership in the society, applies to those who are and continue, as well as to those who become, saloon keepers after its passage.—*Ellerbe v. Faust*, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149.

[e] (N. Y. 1902) A member of an insurance order, who was engaged in selling liquor when he became such member, and continued therein, as he had a right to do under the laws of the order, and paid all dues and assessments upon his certificate for six years, acquired rights under his contract of which neither he nor his beneficiary could be arbitrarily deprived by an amendment to the laws of the order declaring the certificates of all members engaged in such business void. Judgment (1901) 72 N. Y. Supp. 755, 66 App. Div. 323, affirmed.—*Deuble v. Grand Lodge A. O. U. W. of State of New York*, 65 N. E. 1116, 172 N. Y. 665.

[f] (N. Y. 1902) An amendment to the laws of an insurance order, providing that any member who shall, after a specified date, have entered into the business of selling liquor, or who shall thereafter enter into such business, shall stand suspended from all rights in the beneficiary fund, and his certificate shall become void, does not in terms cover the case of a member who was previously engaged in such business and continued therein. Judgment (1901) 72 N. Y. Supp. 755, 66 App. Div. 323, affirmed.—*Deuble v. Grand Lodge A. O. U. W. of State of New York*, 65 N. E. 1116, 172 N. Y. 665.

[g] (Wis. 1897) A member of a mutual benefit insurance order, whose certificate is conditioned on compliance with all the laws of the order then in force or that might thereafter be adopted, is bound by a by-law, adopted after his admission, providing that, if any member engage in any prohibited occupation after admission, he shall stand suspended, and that no action of the order shall be a condition precedent to such suspension, and that the receipt of assessments shall not be a waiver of his engaging in such occupation.—*Schmidt v. Supreme Tent Knights of Maccabees of the World*, 73 N. W. 22, 97 Wis. 528.

[h] (Wis. 1898) A member of a benefit society, accepting insurance subject to its regulations then in force, and to those that might thereafter be adopted, engaged in the liquor business, which was subsequently prohibited by an amendment of its regulations. *Held*, that the amendment was binding.—*Loeffler v. Modern Woodmen of America*, 75 N. W. 1012, 100 Wis. 79.

IX. PROVISIONS RELATING TO SUICIDE BY INSURED.

[a] (Ala. 1882) Where a certificate in a mutual life company provided that the insured must comply with "all laws of the order now in force or which may hereafter be enacted," a by-law subsequently enacted, providing that the certificate should be forfeited if the member, "whether sane or insane," should

take his own life, was a part of the contract.—Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

[b] (Ga. 1902) By-laws enacted by a fraternal insurance order will, in the absence of a clearly expressed intention to the contrary, be construed to have a prospective operation; and a provision in such a by-law that a certificate shall be void if a member dies by his own hand will not affect a certificate issued prior to the enactment of such by-law and containing no such provision.—Sovereign Camp Woodmen of the World v. Thornton, 42 S. E. 236, 115 Ga. 798.

[c] (Ill. 1887) The fact that a member of a mutual benefit association committed suicide will not bar a recovery on his certificate by the beneficiary named therein, when the by-law which repudiates the association's liability in case of suicide was adopted after the issue of deceased's certificate.—Northwestern Benev. & Mut. Aid Ass'n v. Wanner, 24 Ill. App. 357.

[d] (Ill. 1897) A stipulation in a certificate of membership in a mutual benefit association that one of the considerations was a "full compliance by the assured with all the laws governing this rank, now in force, or that may hereafter be enacted by the supreme lodge * * * or the board of control," does not confer upon the board of control the right to pass a law that no member who commits suicide shall be entitled to benefits, where such right is reserved by its constitution to the supreme lodge.—Supreme Lodge Knights of Pythias of the World v. Kutscher, 72 Ill. App. 462.

[e] (Ill. 1897) The charter of a benevolent association, authorizing its supreme lodge to establish an endowment rank on such terms and conditions as to the supreme lodge may seem proper, does not authorize such lodge to delegate to the board of control power to pass a law providing that no member who commits suicide shall be entitled to benefits.—Supreme Lodge Knights of Pythias of the World v. Kutscher, 72 Ill. App. 462.

[f] (Ill. 1897) A provision in the constitution of a benevolent association, having a life insurance department, that its board of control shall have entire charge and full control of the endowment rank, subject to such restrictions as the supreme lodge may provide, does not authorize the board of control to pass a regulation providing that no beneficiary who commits suicide shall be entitled to benefits.—Supreme Lodge Knights of Pythias of the World v. Kutscher, 72 Ill. App. 462.

[g] (Ky. 1904) Ky. St. 1903, § 679, provides that all policies issued to persons within the commonwealth by corporations transacting business therein, which contain any reference to the application of the insured or the by-laws, or to the rules of the corporation having any bearing on the contracts, shall contain or have attached a correct copy of the portions of the by-laws referred to, and, unless so attached, no such by-laws shall be received in evidence in any controversy between parties interested. Held that, where a certificate issued before the enactment of such act contained no reference to suicide, but the insurer, after the passage of the act, passed a by-law that in case a member died by his own hand the company should be liable only for a proportionate amount of the policy, but such by-law was not called to insured's attention nor attached to the policy, it was no defense to an action thereon.—Hunziker v. Supreme Lodge K. P., 78 S. W. 201, 25 Ky. Law Rep. 1510.

[h] (La. 1896) Under a contract of life insurance issued by a mutual company, conditioned to be subject to any by-law thereafter to be enacted, the insured is bound by a subsequent by-law, forfeiting such policies when the insured should die by his own hands.—Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 20 South. 712.

[i] (Miss. 1898) Insured, who contracted, in his application and certificate of life insurance, to be bound by all laws then in force or thereafter to be enacted by the supreme lodge, is bound by a suicide amendment which went into effect two years before his death.—Dornes v. Supreme Lodge Knights of Pythias of the World, 23 South. 191, 75 Miss. 466.

[j] (Mo. 1900) Where a beneficial certificate contained no restriction as to death by suicide, and the policy remained in force for 18 years before an amendment of the by-laws providing for a deduction from policies in case of suicide, such amendment, not having been assented to by insured, would be inoperative as to him, though the certificate contained a statement that it was

subject to the by-laws of the association, and to any amendments that might thereafter be made, since such statement was subject to the implied condition that any subsequent amendment should be reasonable, and such amendment entirely changed the scheme of the insurance, and made a radical departure from the fundamental plan.—*Smith v. Supreme Lodge Knights of Pythias*, 83 Mo. App. 512.

[k] (Mo. 1902) Where a fraternal beneficiary society avails itself of Laws 1897, p. 132 (Rev. St. 1899, § 1408), which provides that no liability shall accrue if the insured shall die by his own hand, and a certificate was accepted with the condition that it was subject to the constitution and by-laws then in force or that might thereafter be adopted, neither the member nor the beneficiary had any vested interest prior to the death of the member that could be affected by such change in the constitution and by-laws.—*Morton v. Royal Tribe of Joseph*, 93 Mo. App. 78.

[l] (Mo. 1903) A benefit certificate bound insured to comply with all the laws and usages of the society then in force or which might be thereafter adopted by the order. At the time the certificate was issued one of the by-laws provided that, if any member should commit suicide within two years, defendant should be liable for one-half of the face of the policy, and thereafter such by-law was amended at various times until it finally provided that if any member should die by suicide his beneficiary should only receive one-half of the certificate. *Held*, that the provision of the certificate requiring compliance with future regulations related only to such regulations as affected the member's duties as a member, and that such member was therefore not bound by the by-law as amended.—*Morton v. Supreme Council of Royal League*, 73 S. W. 259, 100 Mo. App. 76.

[m] (N. Y. 1901) A contract between a beneficial association and a member made liability on the certificate conditional on the member's compliance with the laws and usages of the order then in force or thereafter adopted. Subsequently the association's by-laws were amended by increasing the premiums, and providing that all benefits should be forfeited in case a member died by suicide. No notice of such amendments was brought to the knowledge of the member, and to the time of his death he continued to pay the premium as fixed prior to the amendment. *Held*, that his certificate was not affected by the by-law relative to suicide; it not appearing that such was the intention of the association.—*Shipman v. Protected Home Circle*, 73 N. Y. Supp. 594, 66 App. Div. 448.

[n] (N. Y. 1902) Where a mutual benefit society has insured a party against unintentional self-destruction after one year, it cannot deprive the beneficiary of his rights under the contract by amending its by-laws to the effect that self-destruction, while insane, within five years from the date of the policy, should render it void. Judgment (1901) 70 N. Y. Supp. 1150, 61 App. Div. 613, affirmed.—*Weber v. Supreme Tent Knights of Maccabees of the World*, 65 N. E. 258, 172 N. Y. 490.

[o] (N. Y. 1902) A benefit society, organized to relieve sick members, and to provide for the families of those who might die, issued a certificate to the wife of a member on his agreement to comply with all the laws of the order then in force, or which might thereafter be adopted. *Held*, that the vested rights of the widow in the death benefit were not impaired, where the husband thereafter committed suicide, on the ground that, under a power in the constitution, after the issue of the certificate the supreme council enacted a by-law reducing the death benefit if a member died by suicide.—*Bottjer v. Supreme Council American Legion of Honor*, 75 N. Y. Supp. 805, 37 Misc. Rep. 406.

[p] (N. Y. 1903) Where a contract of insurance with a mutual benefit association was silent on the subject of suicide while sane, but a by-law subsequently enacted provided that the certificate should be void if insured die by suicide, sane or insane, such by-law applied to the certificate in force at the time of the amendment, where the member subsequently committed suicide while sane, as it invaded no vested right. Judgment (1901) 73 N. Y. Supp. 594, 66 App. Div. 448, modified.—*Shipman v. Protected Home Circle*, 67 N. E. 83, 174 N. Y. 398.

[q] (N. Y. 1903) Where a contract with a mutual benefit association was silent on the subject of suicide while insane, the member acquired a vested right to an insurance covering that risk, and no subsequent amendment of the by-laws could affect such right. Judgment (1901) 73 N. Y. Supp. 594, 66 App. Div. 448, modified.—*Shipman v. Protected Home Circle*, 67 N. E. 83, 174 N. Y. 398.

[r] (N. Y. 1904) A by-law of a beneficial association providing that, in case a member commits suicide, the association shall be liable for only 75 per cent. of the face of his policy, was binding on a member who became such before the enactment of the by-law, where the original contract and by-laws were silent on the subject.—*Mitterwallner v. Supreme Lodge Knights and Ladies of the Golden Star*, 86 N. Y. S. 786.

[s] (Ohio, 1903) Where the constitution and by-laws of a beneficiary association provide that the same may be altered and amended, and the application for the beneficiary certificate sets forth that the member will comply with all the laws, rules, and regulations then in force or that may thereafter be enacted, an amendment to the constitution and by-laws, providing that committing suicide by a member, sane or insane, shall avoid the certificate and forfeit all benefits thereunder, is valid, and applies to a certificate issued under such application previous to such amendment.—*Protected Home Circle v. Tisch*, 24 Ohio Cir. Ct. R. 489.

[t] (Pa. 1901) Though a by-law providing that no benefit shall be paid on account of the death of a member from suicide within one year after admission exists at and for more than a year after issuance of the certificate, it is subject to the amendment of the by-law, made before death of the member, extending such period to five years, the payment of the benefit being stipulated therein, provided the member shall have complied with the laws of the order "now in force or that may hereafter be adopted."—*Chambers v. Supreme Tent Knights of the Maccabees of the World*, 49 Atl. 784, 200 Pa. 244.

[u] (Tenn. 1895) Where the application for membership in the endowment rank of a benevolent association provides that the applicant shall conform to and obey the regulations of the order governing the rank then in force or that may hereafter be enacted, and the certificate of membership recites that the consideration on which it was issued is, among other things, the full compliance by the member with all such regulations, the right of a beneficiary is subject to a validly enacted law of the order, passed after the issuance of the certificate, providing that the beneficiary of a member who commits suicide shall not be entitled to benefits.—*Supreme Lodge K. P. v. La Malta*, 95 Tenn. (11 Pickle) 157, 31 S. W. 493, 30 L. R. A. 838.

[v] (Tex. 1900) Where a beneficial society amends its beneficiary certificates by changing their conditions so as to render them void if insured committed suicide while either sane or insane instead of only while sane, as previously prescribed, which amendment was void because made outside the state of incorporation, a member accepting a certificate before the amendment was enforced, subject to all laws then in force or that might thereafter be adopted, was not precluded from questioning the validity of such amendment, as he was not bound by a law that was not valid.—*Sovereign Camp Woodmen of the World v. Fraley* (Civ. App.) 59 S. W. 905, judgment affirmed 59 S. W. 879.

[w] (Tex. 1903) Where a member of a mutual benefit insurance association agrees in his application and certificate that the laws then in force or that may thereafter be adopted shall form the basis of his contract, and that his benefit shall not be payable unless he shall have complied with the laws then in force or that may thereafter be adopted, he is bound by a subsequent amendment of the by-laws amplifying the defense of suicide.—*Eversberg v. Supreme Tent Knights of Maccabees of the World*, 77 S. W. 246.

[x] (Wis. 1898) The charter of a mutual life insurance company empowered its directors to enact or amend by-laws, and they amended a by-law so as to provide that, in case a member committed suicide, his policy should not be paid. A member whose policy was issued prior to such amendment stated in his application that he would conform to the by-laws "now in force, or which may hereafter be adopted by the * * * board of directors." Held, that such member was bound by such amendment.—*Hughes v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 73 N. W. 1015, 98 Wis. 292.

(128 Fed. 706.)

McMICHAEL & WILDMAN MFG. CO. v. RUTH et al

(Circuit Court of Appeals, Third Circuit. March 1, 1904.)

No. 37.

1. PATENTS—SUIT FOR INFRINGEMENT—TITLE TO SUPPORT.

An executory agreement by patentees to transfer to a third person an interest in patents not identified therein does not operate as an assignment, and cannot be set up by defendants to impeach the title of an assignee of the patent in a suit for its infringement, to which such third person is not a party.

2. SAME—INVENTION.

The fact that an expert, with a patent before him, might be able to build up the structure covered thereby, by selecting and adapting appliances theretofore known, does not overcome the presumption of invention arising from the granting of the patent, where neither the same combination in its entirety nor the same mode of operation had previously been described or known.

3. SAME—INFRINGEMENT—KNITTING MACHINES.

The McMichael and Wildman patent, No. 500,151, for an automatic rib-knitting machine, covers a combination of novelty and utility, and discloses invention. Claims 1 and 2 construed, and *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 123 Fed. 888.

Ernest Howard Hunter, for appellant.

Joseph C. Fraley, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The appellant was plaintiff in the court below, and the appellees were defendants. The suit was begun by bill in equity, which charged the infringement of letters patent No. 500,151, dated June 27, 1893, granted to Abner McMichael and Frank B. Wildman, for "automatic rib-knitting machines." The answer alleged, *inter alia*, that the complainant was not the owner of the entire patent, but that a one-third interest therein was owned by one Lewis Jones, and the point presented by this defense, though not dealt with by the court below, confronts this court at the outset.

The only documentary evidence which was adduced for the purpose of showing title in Jones is as follows:

"Bristol, Pa., 2/18/1888.

"We the undersigned, F. B. Wildman of Bristol, Bucks Co., Pa., and Abner McMichael, of Philadelphia, Pa., do agree, in consideration of the fact that Lewis Jones of Philadelphia has been at the expense of working out an improvement invented by us, on automatic circular sleavers to transfer to said Lewis Jones one third ($\frac{1}{3}$) interest in all of the improvements patented thereon also to transfer to said Lewis Jones one third of any patent which may be issued to us in the future, provided same or any portion thereof has been developed at the expense of said Lewis Jones. Signed this _____ day of February 1888.

"Abner McMichael.

"Frank B. Wildman.

"Witness: _____."

This instrument is wholly executory. It is not an immediate assignment, but an agreement "to transfer." It does not identify the pat-

ent or patents to which it relates, and the obligation it imports is qualified by its proviso. It is obvious, therefore, that it did not convey the legal title to one-third of any patent, and whether or not Jones himself could, upon this writing, together with extrinsic evidence, successfully invoke the aid of a court of equity to establish his supposed interest in this particular patent, is a question which is not now determinable, for he is not a party to this suit. Consequently, this appellant, who in fact holds the legal title to the entire patent, cannot be required to litigate that question at the instance of parties other than Jones, whom it charges with its infringement.

We have not been convinced that the presumption of validity which arises from the grant of a patent was rebutted in this case. Upon this subject "the defendant's proposition is that the substitution made by the patentees did not require invention, but was a mere exercise of selection, wholly within the domain of mechanical skill"; and if it were true that what was done by McMichael and Wildman did not require invention, but only the exercise of mechanical skill, the conclusion which the appellees ask us to deduce from this proposition would, of course, be inevitable. But, in our opinion, the creative faculty of the inventor, and not merely the ingenuity of the skilled mechanic, was exercised in producing the patented combination. This art had been already highly developed, and these patentees brought to it nothing of a fundamental character, but they did, by their "improvements," create a construction which had never before existed, which has proved to be commercially successful, and the novelty and utility of which are especially and quite persuasively indicated by the fact that (as will presently be seen) the appellant itself has appropriated it. The claims involved are:

"(1) In a knitting machine, the combination of a stationary dial carrying the needles, a rotary cam for operating said needles, and having one portion thereof movable for the purpose of varying the amount of reciprocation of the needles, a crank shaft rotating with said movable part of said cam, rotatable supports for the cam and crank shaft, connections between said cam and crank of the crank shaft whereby the latter moves the former, a second shaft geared to the first mentioned shaft and adapted to rotate simultaneously in an opposite direction, arms secured to the respective shafts at different elevations so that when one is thrown in the other is thrown out, pattern mechanism, and projecting parts moved by the pattern mechanism for bringing said parts into the path of either of the arms for operating said arms, respectively, at different times.

"(2) In a knitting machine, the combination of a stationary dial carrying the needles, a rotary cam plate having a cam for operating said needles of the dial, and having one portion of the cam movable for the purpose of varying the amount of reciprocation of the needles, a crank shaft rotating with said movable part of said cam, a rotating support for the cam plate, a connection between said cam and crank of the crank shaft whereby the latter moves the former, a second shaft mechanically connected to the first-mentioned shaft and adapted to rotate simultaneously in an opposite direction, arms or projections secured to the respective shafts at different elevations so that when one is thrown in the other is thrown out, pattern mechanism, and projecting parts moved by the pattern mechanism, for bringing said parts into the path of either of the arms for operating said arms respectively at different times, and a removable ring piece adapted to rotate with the cam and carry the said shafts."

Attentive examination of the testimony and exhibits has fully satisfied us that although it is perhaps possible for an expert, having the patent in suit before him, to build up the structure covered by these claims, by selecting and deftly adapting appliances theretofore known, "yet it would still be true that neither the same combination in its entirety nor the same mode of operation" had previously been described or in any manner exemplified. *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54; *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68. In *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 492, 20 Sup. Ct. 708, 44 L. Ed. 856, cited for the appellees, the combination of the patent there in question had been in prior use, and what was decided was that it did not involve an exercise of the inventive faculty to employ the same combination for a different purpose.

The decree of the Circuit Court was based wholly on its finding that the defendants below had not infringed, and upon that subject the learned judge said:

"The precise point at issue between the parties appears in the following question and answer from the cross-examination of defendants' expert: '(114) If the court should be of opinion that the connection between the rock shaft and the second shaft in defendant's machine is a geared connection, this particular combination of elements [i. e., the combination described in complainant's patent] is found in defendants' machine? Ans. With the assumption made in the present question that the pin and slot connection found in defendants' machine is identical with the geared connection referred to in the patent in suit, the combination of elements specified may be found in defendants' machine.' In view of this definite statement, a detailed description of the defendants' machine is unnecessary. It has a pin and slot connection between the shafts, instead of the connection described in the claims of the patent, and, considering the prior art, I am of opinion that the complainant cannot successfully assert that the device employed by the defendants infringes the patent in suit. * * * The characteristic of the complainant's machine is that it employs gears as the connection between the crank shaft and the second shaft, whilst the defendants do not employ gears."

We are unable to concur in the view which, as appears from this extract, was taken of the question of infringement by the court below. In our opinion, the restrictive construction of the claims upon which it was founded was not warranted by the terms of the patent, nor demanded by the prior state of the art. Neither of these claims contains the word "gears." In the first, the phrase is, "a second shaft geared to the first-mentioned shaft"; and in the second it is, "mechanically connected with the first-mentioned shaft." So far, therefore, as the first claim is concerned, there is nothing in its terms to justify its restriction to any particular gears; and in the specification it is said: "We do not limit ourselves to the mere details of construction, as they may be modified without departing from the invention." The first claim, therefore, does not appear upon the face of the patent to be limited to the gears in the drawings, but covers any geared connection capable of performing the purposed function; and that the second claim, in which the words "mechanically connected" are used, includes any mechanical connection by which the required movements may be imparted by either shaft to the other, seems to be too plain for argument. Nor did the prior art necessitate the narrow construction which was put upon these claims by the court below. The appellees'

expert in effect testified, and we think with accuracy, that there had not previously existed any combination including each of the elements of either claim, and, accepting this statement, it follows that, if the construction of the appellees does embody those elements in the same combination, it is an infringement. *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 3 C. C. A. 559. Therefore the only substantial question which remains for consideration is that which has been heretofore adverted to, and which was regarded by the learned Circuit Judge as presenting the precise point at issue, viz.: Is the connection between the rock shaft and the second shaft in the appellees' machine a geared connection? Defining a geared connection as, with reference to claim 1, we have already defined it, we are of opinion that it is. As is said in appellant's brief, the inherent character of the appellees' connection is not changed by calling it "a pin and slot connection." Although the tooth which projects from one shaft is provided with a pin which engages with teeth projecting from the other, this does not alter the true character of the mechanism or its mode of operation. The requisite function is performed by the pressure of a tooth or projection of one shaft on a tooth of the other shaft, and hence the connection is certainly mechanical, and the understanding of appellant's expert that it is also a geared connection accords with our construction of that term, and is, we think, correct.

Having reached the conclusion that the claims in controversy are valid, and being of opinion that the Circuit Court erred in its finding that they had not been infringed by the appellees, the decree appealed from must be reversed, and the cause will be remanded to that court, with direction to enter a decree in the ordinary form, and upon both claims, in favor of the plaintiff below.

(128 Fed. 709.)

**AMERICAN DELINTER CO. v. AMERICAN MACHINERY &
CONSTRUCTION CO.***

(Circuit Court of Appeals, Fifth Circuit. February 23, 1904.)

No. 1,309.

1. PATENTS—SUFFICIENCY OF DESCRIPTION.

It is not essential to the validity of a patent to insert in the drawings and specification a description of every detail. It is sufficient if the description is such as to enable a mechanic skilled in the art to construct the device patented.

2. SAME—FAILURE TO SPECIFY MINOR PART.

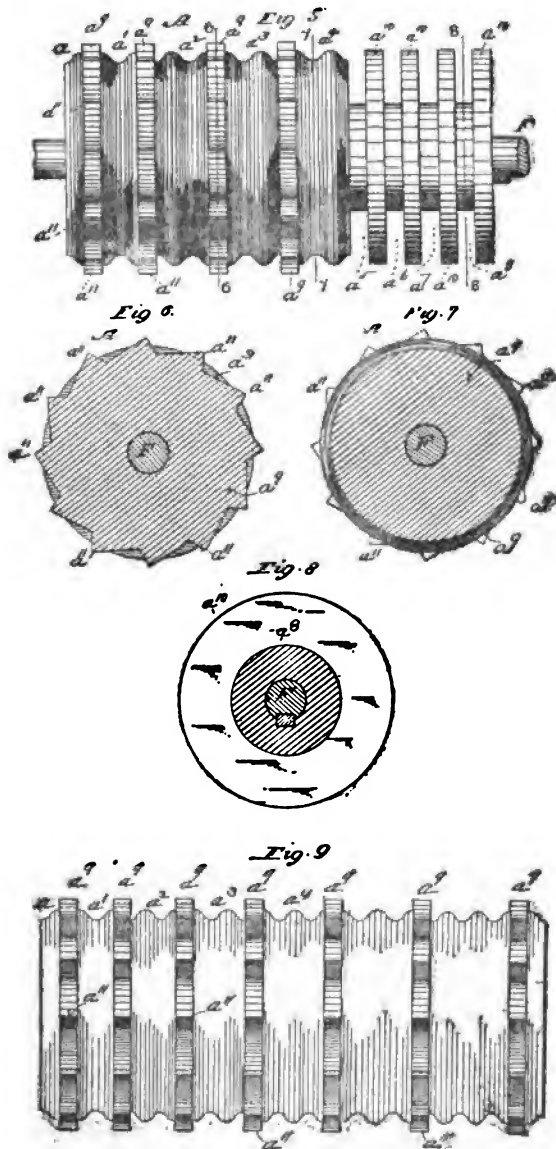
A patent for a machine for delinting cotton seed, which shows that the seed is to be fed into the machine at one end and discharged at the other, is not invalidated by the failure to specify or show in the drawings a feed screw or other device for assisting to move the seed through the machine: the machine being operative without it, but it being obvious that some such device would aid the passage of the seed through the machine, and when in fact it was used in the construction of the first machine.

3. SAME—INFRINGEMENT—COTTON SEED DELINTER.

The Thomas patent, No. 503,103, for a machine for delinting cotton seed, was not anticipated, and, although the parts were old, shows a com-

* Rehearing denied April 5, 1904.

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 133, 135.



"To All Whom it may Concern:

"Be it known that I, Abner D. Thomas, of Little Rock, Arkansas, have made a new and useful improvement in methods of and apparatus for delinting cotton seed, of which the following is a full, clear, and exact description.

"In carrying out the improvement the lint-bearing seed is fed into a receptacle containing a lint-cutting or seed-abrading part which, in its general outline,

is cylindrical or approximately cylindrical, and which is arranged horizontally and adapted to be rotated in a vertical, or approximately vertical, plane. The shell or casing which forms the wall of the seed-receptacle is not in itself intended to serve as a lint-cutting or seed-abrading part, but to form a support for the material while it is being acted upon by the rotating part, and it is shaped and arranged, and is of suitable size, to inclose an annular, or approximately annular, space around the rotating part so that the material being treated can assume an annular, or approximately annular, form around the described rotating part, and, opposite the surface of the rotating part, it is perforated to provide an outlet for the lint which is separated from the seed. There is a separate outlet for the denuded seed. The perforations in the shell or casing are large enough, and are suitably formed, to enable the lint to escape through them, but not so large that the denuded seed can pass through them. It is not essential that the perforations, as a system, extend entirely around the circumference of the shell or casing, but it is desirable for them to so extend as thereby an outlet for the lint is obtained in all directions around the body of seed being treated. An escape flue for the lint connects with the outer side of the perforated portion of the casing through which the lint discharged through the casing is carried off. The denuded seed is worked endwise within the described annular space and is discharged through the separate outlet mentioned. This outlet is usually at the end of the seed-receptacle, and it may be of any suitable form for the purpose in question, and lead to any desired quarter. In constructing the perforations which form the lint-outlet care should be taken to avoid projections, roughnesses, or anything calculated either to interfere with the movement (hereinafter referred to) of the annular body of seed, or with the escape of the lint. The rotating part is the means relied upon for separating the lint from the seed, and to further that end it is not only itself adapted to be rotated but it is also so shaped or contrived as to cause its motion to be communicated to the surrounding body of seed to cause it in turn to rotate or move within the annular space, so that all portions of it are presented to the surface or surfaces of the rotating part and all the different lint-bearing seeds substantially brought directly into contact with the rotating part, to be uniformly and thoroughly treated. That is, the lint-bearing seed, as a body, is carried around in the annular space, but at a slower rate than that at which the rotating part is revolved—say about one half as fast—and the seed in consequence, is abraded by the rotating part, and at the same time in all parts of the rotating body of seed the seed is stirred and tumbled about and overturned and thereby uniformly treated, and an additional feature of the improved method consists in advancing the seed-roll endwise through the seed receptacle and thereby carrying the seed repeatedly around the rotating part, and subjecting the seed again and again to the abrading, cutting, or tearing action of the rotating part until the seed becomes substantially stripped of its lint, and the lint and denuded seed discharged separately, all as is hereinafter set forth and claimed, aided by the annexed drawings making part of this specification, in which—

"Figure 1 is a plan of the improved delinter, portions of the inner and outer casings which inclose the rotating part, and also a portion of the casing of the air-moving apparatus, being broken away to exhibit the interior; Fig. 2 a side, sectional, elevation of the delinter; Fig. 3 a front end elevation of the delinter; Fig. 4 a vertical transverse section on the line 4—4 of Fig. 2; Fig. 5 a side elevation of the rotating part which effects the separation of the lint from the seed; Fig. 6 a cross section on the line 6—6 of Fig. 5; Fig. 7 a cross section on the line 7—7 of Fig. 5; Fig. 8 a cross section on the line 8—8 of Fig. 5; Fig. 9 a side elevation of the rotating part in a simpler form.

"The same letters of reference denote the same parts in all the figures.

"A represents the rotating part.

"B represents the perforated casing which incloses the annular space, b, around the rotating part.

"C represents an outer casing which incloses a flue, D, which surrounds the casing, B. This flue leads to an air-moving apparatus, E, and preferably in the form of the two branch flues, d, d', which lead, respectively, from the end

portions of the flue, D, or casing, B, and which respectively connect with the two chambers, e, e', of the air-moving device. For while a single escape flue and air-moving device will answer to move the lint from the chamber, D, I prefer, for a reason presently mentioned, to employ the two separate escape flues and to make the air-moving device a double one, as thereby the lint can be graded and the different grades separately discharged from the delinter. To accomplish this the air moving device is in the form of a pair of fans, e², e³, attached to the same shaft, e⁴, but rotating in the separate chambers, e, e', respectively, and separate outlets, e⁵, e⁶, lead from the chambers, e, e', respectively, substantially as shown. The rotating part, A, is attached to a suitable shaft, F, and by means of a pulley, G, thereon, power can be transmitted to effect the revolution of the part, A, at as rapid a rate as may be desired, and by means of the belt, H, leading from another pulley, h, upon the shaft, F, to a pulley, h', upon the shaft, e⁴, the rotation of the fan is accomplished.

"I represents a suitable inlet through which the lint-bearing seed is introduced into the seed-receptacle, b, and J represents a suitable outlet for the seed after the lint has been separated therefrom.

"A suitable frame work, K, sustains the described parts of the delinter.

"The part, A, so far as the general object of the improved delinter is concerned, may be constructed of any suitable material, materials, part or assemblage of parts, and in any suitable shape so long as it, as a whole, is calculated to both move and carry around the body of lint-bearing seed, and to cut, abrade or otherwise separate the lint from the seed, and as one desirable form thereof the part, A, is composed in portions, if not largely or wholly, of corundum, and in the particular shape shown substantially in Figs. 5 to 8, and as follows: As a whole the part may be considered cylindrical, but beginning at that end of it which is opposite or next to the inlet to the seed-receptacle and proceeding to or toward the opposite end of the part, the surface of the cylinder is in the form of a series of channels or grooves which encircle the cylinder, and which at various intervals are separated by portions which are serrated, pointed, or shouldered, or otherwise shaped, to catch hold of, stir, lift, and drag around the surrounding body of lint-bearing seed in the manner described.

"In the present illustrations, a, a', a², a³, a⁴, a⁵, a⁶, a⁷, a⁸, represent the grooves, and a⁹, a⁹, a⁹, a⁹, represent the pointed or shouldered portions, and a¹⁰, a¹⁰, a¹⁰, represent circular, disk-like portions, which are used more especially in conjunction with the channels or grooves a⁵, a⁶, a⁷, a⁸, and which, when used are at that end of the cylinder which is toward the denuded-seed outlet, substantially as shown. The channeled or grooved portions serve more especially to cut, abrade, and separate the lint from the seed. The portions, a⁹, a⁹, serve as stated to move, lift, and drag the seed. The channeled or grooved portions, a⁵, a⁶, a⁷, a⁸, are considerably deeper than are the other channeled or grooved portions and they serve, in conjunction with the circular portions a¹⁰, to provide an extended abrading surface past which the nearly-denuded seed is, in the operation of the parts, moved and thereby substantially completely stripped of its lint. They serve therefore to finish the treatment of the seed and I consider them desirable, although the improvement can be largely, if not entirely, carried out by means of a cylinder which does not have them, but which may be constructed substantially as shown in Fig. 9. The channeled or grooved portions, a, a', etc., preferably have the waved contour shown, and said portions, beginning at the inlet end of the cylinder, successively preferably increase in width substantially as shown, and the shouldered portions are successively arranged farther and farther apart. The points, projections or shoulders, a¹¹, of the portions, a⁹, project in practice, radially beyond the adjoining channeled or grooved surfaces, substantially as shown. The entire cylinder, A, may be composed of a series of separate parts, a, a', etc., a⁹, a¹⁰, assembled and united upon the shaft, F, and connected therewith, to be rotated as a single part. As the portions, a⁹, serve rather to agitate and drag the seed it is not so essential that they be composed of abrading material or be adapted to cut or abrade the lint. But the capacity of the cylinder, A, as a lint-separating device, is increased by adapting the portions, a⁹, to serve also as a lint-separating means.

"In operation, the lint-bearing seed is introduced into the seed-receptacle and the abrading cylinder, A, is set in motion. The seed works its way throughout the receptacle and assumes the described annular form around the cylinder. The cylinder acts upon the seed immediately adjacent to it and the separation of the lint from the seed is initiated. At the same time, owing to the described projections upon the cylinder, the body of seed as a whole is caused to rotate within the receptacle and to follow the cylinder in its movement. The cylinder, in respect to that feature of it which enables its motion to be imparted to the body of seed or seed-roll as it may be termed, is provided with projections which while they engage the interior of the roll allow the roll to slip, or travel around at a slower rate than the cylinder, for the reason that they do not take a complete and positive hold of the roll, and also to some extent by reason of the contact of the exterior of the roll against the perforated casing. The preferred distance from the extremities of the projecting portions of the cylinder to the surrounding casing is about seven eighths of an inch. The seed as a body not only travels around within the casing, and by reason of its slower rate of movement is acted upon by the cylinder, but is also in all parts of it stirred and turned to cause the seed throughout the thickness of the roll to be presented to the action of the cylinder. And further, and owing to the horizontal arrangement of the cylinder, the seed, which is by the action of the cylinder lifted or carried into the upper portion of the seed-receptacle, is in position to drop, and by reason of its gravity it does drop onto the cylinder and the seed in consequence is further subjected to the abrading action of the cylinder and in consequence is more thoroughly treated. In thus presenting the lint-bearing seed to the cylinder care must be taken not to crowd it against the surface of the cylinder, as in such case the cylinder is liable not only to remove the lint but also to cut the hulls of the seed something which is quite undesirable, for the value of the entire process depends largely upon separating the lint without any admixture of any part of the seed. For this reason it is necessary for the lint-bearing seed to be presented gently to the cylinder and this is accomplished by having a sufficient thickness of seed-body, substantially as described, around the cylinder as thereby a yielding support is constantly provided for those of the seeds which are for the time being immediately in contact with the cylinder. The roll as stated is preferably introduced into the seed receptacle at one end thereof, and it, as a body, is not only caused to rotate in the manner described but it is also advanced toward the opposite end of the seed receptacle, and in this way the seed is repeatedly subjected to the action of the cylinder and thereby given ample opportunity for becoming stripped of its lint. The separated lint is continually being exhausted through the outlets in the casing and the seed escapes through its own outlet at the end of the seed receptacle. The operation is a continuous one as long as the machine is in operation and the lint bearing seed supplied thereto. Air is admitted into the flue, D, preferably through the opening, *c*⁶, in the casing, C, and the opening can be graduated by means of the slide, *c*¹⁰. The inlet, I, is not shown in Fig. 3.

"I claim—

"(1) The herein described method of separating lint from seed which consists in forming the lint-bearing seed into an annular roll and then subjecting such roll internally to a rubbing or cutting action whereby the lint is separated from the seed.

"(2) The herein described method of separating lint from seed which consists in forming the lint-bearing seed into an annular roll, revolving the same on its axis, and, while so moving, subjecting it internally to a rubbing or cutting action, whereby the lint is separated from the seed.

"(3) The herein described method of separating lint from seed which consists in forming the lint-bearing seed into an annular roll, revolving the same on its axis, and while so moving, subjecting it internally to a rubbing or cutting action, whereby the lint is separated from the seed, and discharging the separated lint at the external surface of the roll.

"(4) The herein described method of separating lint from seed which consists in forming the lint-bearing seed into an annular roll, revolving the same on its axis; and at the same time stirring the roll, and, while so moving it, subjecting the roll internally to a rubbing or cutting action, whereby the lint

is separated from the seed, and discharging the separated lint at the external surface of the roll.

"(5) In a seed-delinter, the combination of a horizontally-arranged, rotating cylinder and an outer casing, said casing being perforated to provide an outlet for the separated lint and seed, and said cylinder having channeled and shouldered portions to effect the movement of the seed in the form of a roll and the separation of the lint therefrom, substantially as described.

"(6) In a seed-delinter, the combination of a horizontally-arranged rotating cylinder and an outer-casing, said casing being constructed and arranged to provide for the formation of an annular roll of lint-bearing seed around said cylinder, and being perforated to provide an outlet for the separated lint and seed, and said cylinder having projecting portions to effect the rotation of said roll as described and having cutting or abrading surfaces to effect the separation of the lint from the seed.

"(7) In a seed-delinter the combination of a horizontally-arranged, rotating cylinder, an annular lint-bearing seed receptacle surrounding said cylinder, a lint-discharge flue without said seed receptacle and an air moving apparatus, said receptacle having an inlet for the lint-bearing seed and an outlet for the denuded seed, and its casing being perforated to provide an outlet for the separated lint, and said cylinder having projecting portions to effect the rotating of said roll as described and having cutting or abrading surfaces to effect the separation of the lint from the seed, substantially as described.

"(8) In a seed-delinter a horizontally arranged cylinder in combination with a surrounding annular, seed receptacle, said cylinder having channeled surfaces for effecting the separation of the lint from the seed and having pointed or shouldered portions for effecting the rotation of the lint-bearing seed around said cylinder, said channeled portions being deeper at the seed-delivery end of the cylinder.

"Witness my hand this 4th day of February, 1893.

"Abner D. Thomas.

"Witnesses:

"H. H. Schmuck.

"A. H. Thomas."

The following are the drawings and specifications of the Baxter patent, referred to in the opinion:

No. 639,648.

Patented Oct. 16, 1900.

W. C. BAXTER.
COTTON SEED DELINTER.
Applying the Div. 2, 1900.

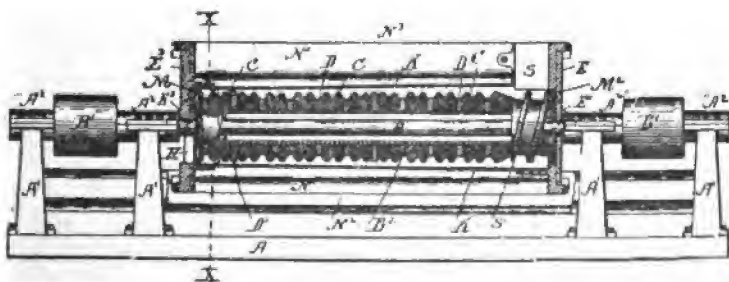


Fig. 1.

"To All Whom it may Concern:

"Be it known that I, William C. Baxter, of East Bridgewater, in the county of Plymouth and state of Massachusetts, have invented a new and useful improvement in cotton-seed delinters, of which the following, taken in connection with the accompanying drawings, is a specification.

"My invention relates to improvements in machines for removing the lint from cotton-seed; and it consists in devices by which a much better feeding

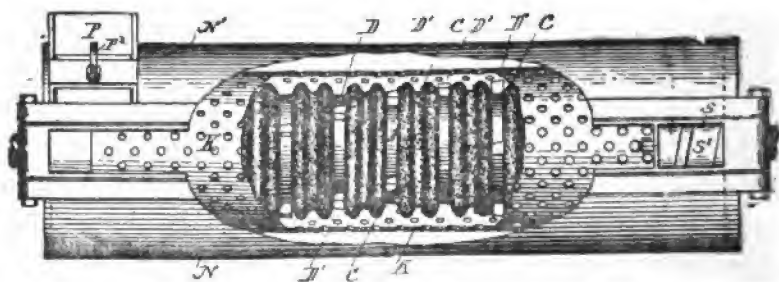


Fig. 2.

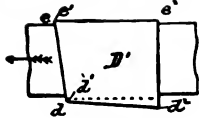


Fig. 7.

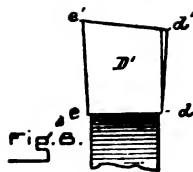


Fig. 6.

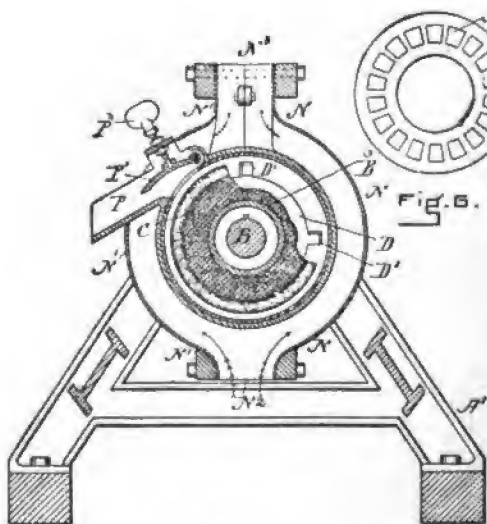


Fig. 3.

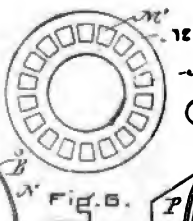


Fig. 5.

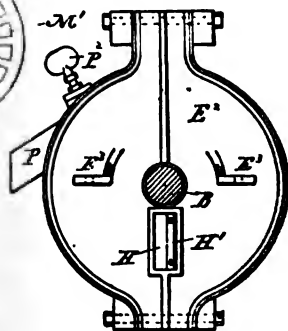


Fig. 4.

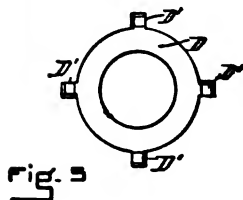


Fig. 8.

action is attained, the practical working of the machine is improved, and there is no danger of the running parts becoming clogged.

"My invention is illustrated in the accompanying drawings, in which—

"Figure 1 shows the machine partly in elevation and partly in vertical section. Fig. 2 is a plan showing the essential features of my machine, a part being represented as broken out to show the interior construction. Fig. 3 is a vertical section taken on line, X X, Fig. 1, enlarged. Fig. 4 shows in end elevation the cylindrical part of my machine; Figs. 5, 6, 7, and 8, details.

"The framework of my machine is represented by A, A', A². The main shaft, B, is mounted on bearings, A², A² (see Fig. 1), and is driven by the belt-

pulleys, B', B'. A sleeve or hollow shaft, B², is mounted upon the shaft, B, and is rigidly affixed to it. At each end of the sleeve, B², a disk is attached, one, M², of these disks permanently fixed to the sleeve, but the other, M, is screwed on, as shown in Fig. 1.

"C, C, are a series of abrading or grinding wheels mounted upon the sleeve, B². These wheels, C, C, are made of corundum wholly or in part and are more or less grooved circumferentially, as shown. Between each pair of the wheels, C, C, I place a metallic disk, D, each of which has teeth or projections, D', D'. These teeth are arranged spirally, as shown in Fig. 2, so that as they rotate they have a tendency to feed the cotton-seed along, as well as to act as stirrers and also to assist in removing the lint from the seed.

"The teeth, or, as I prefer to call them, 'stirrers,' D', D', are made in a peculiar form to adapt them to their work. This form is clearly shown in Figs. 7 and 8. In Fig. 7 a stirrer is shown in plan and in Fig. 8 in front elevation. The front face, d, e, e', d', is inclined, as indicated, so as to have a tendency to cause the seed to advance along the cylinder from the feed end to the discharge end. The side face (indicated by the line, d, d²) is also inclined, so as to force the seed in the same direction. The top face, d', e', e², d², is also inclined, as indicated by the line, e', d', Fig. 8, for the same purpose. The front face of the stirrer being inclined, as shown, serves as it travels through the seed to force the seed primarily against the corundum rolls, from which it is forced outward against the inner surface of the perforated cylinder, so that the lint is rubbed or ground from it, and the position of each seed is constantly changed throughout the mass. At the same time the seed is packed in the mass with sufficient pressure to be so held against the grinding-roll that the lint will be ground away.

"From the above it may be seen that the stirrers act to prevent the machine from clogging, to assist in the delinting operation, and to advance the seed from the feed end to the discharge end of the machine.

"It will be observed that the corundum wheels, C, C, and the disk, D, D, constitute a delinting-drum mounted upon the shaft, B, which is driven with great force and rapidity by the belt-pulleys, B', B'.

"A perforated cylinder, K, surrounds the working or delinting drum. This cylinder, K, is made conical, being smaller at the left-hand end than at the right—that is, it is larger at the end which receives the seed to be delinted (from the chute, S) than at the end from which the denuded seed is delivered to the outlet, P. This construction allows of a larger space between the drum and the interior of the perforated cylinder at the feed end than at the delivering end, which is highly desirable, especially in connection with the suction, as the seed when entering are covered with lint and require more space than when the lint has been taken off from them and they are about to pass out of the machine through the outlet, P. This same result could be attained by making the diameter of the delinting-drum larger at the discharge end than it is at the feed end and by making the perforated cylinder, K, of the same diameter at each end. The perforations in the cylinder, K, are larger at the feed end than at the discharge end, for the reason that the lint is longer and requires larger orifices for escape than is required at or near the discharge end, when the seed-covering is of a much finer nature.

"To assist in feeding, I have a worm, S', attached to the shaft, B, at the discharge end of the chute, S, so that as the seed covered with lint fall from the chute they are fed into the space between the delinting-drum and the cylinder, K. As the process of delinting goes on the lint works out through the openings in the cylinder, K, and is carried off by a suction applied at N³. In practice a hood or receiving-chamber is mounted at N³ to receive the lint that is removed from the seed, the seed passing out through the chute, P. For convenience I place an adjustable door or valve, P', in the chute, P, which may be operated by the screw, P². By adjusting the valve, P', the discharge of the denuded seed may be regulated—that is, the seed may be held back just enough to keep the space between the delinting-drum and the perforated cylinder well filled and in position to be acted upon.

"The end pieces, E and E², are solidly attached to the framework by the bracket-pieces, E' and E³. (See Fig. 1.) The cylinder, K, and the casing, N, N', are firmly fixed to said end pieces, E and E².

"To operate my machine, the seed covered with lint is placed in the chute, S, and falling upon the worm, S', is fed along into the space between the delinting-drum and the perforated cylinder, K, and there acted upon, being carried around the said drum and gradually forced in a longitudinal direction toward the discharge-chute, P. As the seed is forced along it is subjected to the abrading action of the corundum wheels, C, C, and also to the action of the teeth or stirrers, D', D', on the disks, D, D.

"The end disks, M, M², Fig. 1, are provided with a series of recesses or pockets, M', M' (see Fig. 6), which are used for inserting lead for the purpose of balancing the delinting-drum.

"To prevent the accumulation of dust, etc., between the end disk, M, and the headpiece, E², I have an opening, H, in the headpiece, E², and a scraper, H'. This scraper, H', bears against the face of the end disk, M, and rubs off the dust, forcing it out through the opening, H.

"I claim—

"(1) In a delinter, a rotating drum and a perforated cylinder surrounding it, said drum and cylinder being shaped with relation to each other as shown and described, whereby a chamber is formed surrounding said drum tapering in size from the inlet to the outlet, in combination with means for creating suction about said chamber, and feed and delivery devices, substantially as set forth.

"(2) In a delinter, a rotating drum, and a perforated cylinder surrounding it, the perforations in said cylinder being larger at the inlet than at the outlet, and said drum and cylinder being shaped with relation to each other as shown and described whereby a chamber is formed surrounding said drum and tapering in size from the inlet to the outlet, in combination with means for creating suction about said chamber, and feed and delivery devices, substantially as set forth.

"(3) In a delinter, a rotating drum and a perforated cylinder surrounding it, the parts being so proportioned that the seed-space between them decreases from the feed to the delivery end; combined with a chamber surrounding the cylinder, means for creating suction therein, and means for forcing the seed while in transit against said drum, substantially as and for the purpose set forth.

"(4) In a delinter, a horizontal rotating drum, and a perforated cylinder surrounding it and having its perforations decreasing in size from the feed toward the delivery end; combined with a chamber surrounding the cylinder, and means for creating a suction therein, substantially as and for the purpose set forth.

"(5) In a delinter, a rotating drum, and a cylinder surrounding the same and provided with perforations decreasing in size toward the delivery end, the parts being so proportioned that the seed-space between the drum and cylinder also decreases in size from the feed end toward the delivery end; combined with a chamber surrounding the cylinder, and means for creating a suction therein, substantially as and for the purpose set forth.

"(6) In a delinter a rotating delinting-drum, a fixed perforated cylinder surrounding said drum, a headpiece as E² having a dust-opening as H provided with a scraper adapted to remove dust from the end of the delinting-drum, substantially as and for the purpose set forth.

"(7) In a delinter, a delinting-drum consisting of a series of corundum wheels and disks having teeth, said teeth having the form of irregular hexahedrons the working faces of which are inclined to the line of their motion whereby they act as stirrers, rubbers and feeders, substantially as and for the purpose set forth.

"(8) In a delinter, a horizontal, self-feeding, delinting-drum inclosed in a perforated cylinder; and a seed-escape passage arranged tangentially to the said perforated cylinder; and a regulating-valve swinging upon an axis parallel to the axis of the said cylinder, and having its free end adjustably held; and mechanism for adjusting the said valve, substantially as and for the purpose set forth.

"(9) In a delinter, a rotating delinting-roll, consisting of a series of grinding-wheels, and a series of stirrers, each stirrer having one or more teeth, one or more faces of each tooth being inclined with relation to the axis of the roll, as described, and a perforated cylinder surrounding said roll, said roll and said

cylinder being shaped with relation to each other, as shown, whereby a chamber is formed surrounding said roll and tapering in size from the inlet to the outlet, and the seed in process of delinting is forced during said process toward said outlet, in combination with feed and delivering devices, as set forth.

"In testimony whereof I have signed my name to this specification, in the presence of two subscribing witnesses, on this 2d day of December, A. D. 1898.

"William C. Baxter.

"Witnesses:

"Frank G. Parker,

"Frank G. Hattie."

Robert P. Hains, for appellant.

T. C. Catchings, for appellee.

Before McCORMICK and SHELBY, Circuit Judges, and PAR-LANGE, District Judge.

SHELBY, Circuit Judge. The bill beginning this suit was filed by the complainant (appellant here), an Arkansas corporation, against the defendant (appellee here), a Mississippi corporation. The complainant is the owner of patent No. 503,103, of date August 8, 1893, for a new and useful improvement in methods of and apparatus for delinting cotton seed, and known as the "Thomas Delinter." It alleged that the defendant had infringed the patent of the complainant by making, using, and leasing, and offering to lease, a machine known as the "Baxter Delinter," patented October 16, 1900, as shown by letters patent No. 659,840. The complainant prayed for damages for the alleged infringement and for a perpetual injunction. The defendant answered that the Thomas patent was not valid, and that it had been anticipated in whole or in part by 18 other patents named, and admitted the making and leasing of the Baxter delinter, but denied that in doing so it had infringed the rights of the complainant, and denied that the Baxter delinter was substantially the same as the Thomas delinter in purpose, construction, or operation.

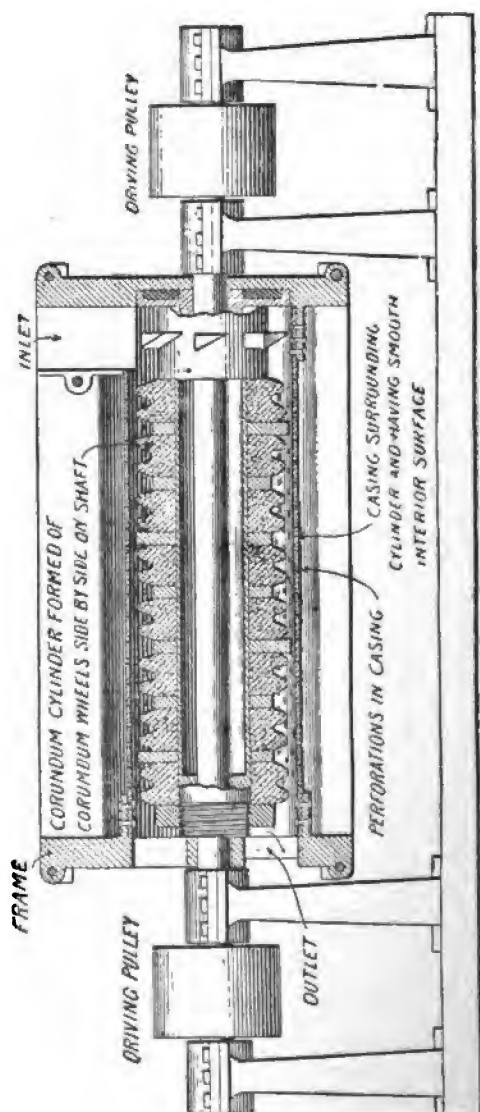
The Circuit Court dismissed the bill, denying the complainant any relief, and an appeal was taken to this court. It is assigned, with proper specifications, that the Circuit Court erred in the decree dismissing the bill.

There are two questions to be decided: (1) Is the Thomas delinter patent valid? (2) Has the defendant infringed that patent?

1. It is matter of common knowledge that when cotton is passed through the gin, while the long lint is separated from the seed, there is left clinging to the seed a short lint. This short lint has some value when separated from the seed, and its separation adds to the commercial value of the seed. It has been evident for many years that a machine that would rapidly and economically delint cotton seed would be of great value. Before the invention of the Thomas delinter several delinting machines had been patented, but an examination of them shows that they differ in many material particulars from the Thomas machine, and, so far as appears from the record, not one of them was successful in its operation. We shall have occasion later to refer to them again.

A Thomas delinter was exhibited to the trial court and to this court at the hearing. Its several parts are shown in the drawings accompanying the patent. Any description we may be able to give will be greatly

aided by the following figure taken from the brief of the appellant, which represents the machine with its several parts adjusted:



The patent, claims, and the other evidence in the record show that the machine is constructed with a central horizontal shaft, supported by a frame at or near each end, with a drawing pulley on each end. On the shaft are placed a series of corrugated corundum wheels, 12 inches in diameter. Between the corundum wheels are space blocks. On the space blocks are stirrers, nearly flush with the corundum wheels. These

stirrers are to stir the cotton seed, and to push them towards the discharging end of the machine. The corundum wheels fastened on the shaft are surrounded by a perforated metal casing, the perforations being large enough for the lint, but not the seed, to pass through them, the inside of the perforated casing being smooth. This metal casing is situated about one inch from the rim of the corundum wheels. Outside of this perforated casing is another metal casing, which is open at the bottom, and connects at the top with a suction fan, which draws the lint through the perforations when it has been scoured from the seed by the corundum wheels. The cylinder of corundum wheels being put in motion by the belts, the seed pass into the machine at the top of the end marked "inlet." They pass through the machine lengthwise, the machine being held close to the corundum wheels by the smooth perforated casing. The seed are delinted by the wheels, and pass out at the bottom of the other end of the machine, marked "outlet," the lint as it is scoured off being separated from the seed by being sucked through the holes in the first casing. Connected with the inlet end of the machine there is a down spout, 6 or 8 feet high, and a screw-shaped block of wood next to the first corundum wheel. The feed of seed being continuous, the space between the cylinder and the perforated casing is filled, and is kept full, although the delinted seed are discharged at the outlet. The rotation of the corundum wheels and the stirrers on the space blocks causes the circular or annular roll of seed to revolve, but at less speed than the corundum wheels. The result is that the lint is removed from the seed, and the lint and seed separately discharged from the machine.

The Thomas patent and the original drawings do not show the feed screw or the screw-shaped block at the inlet. The patent clearly shows, however, that the seed were to be fed to the machine at one end and to be discharged at the other. The evidence shows that in the construction of the first machine a screw-shaped block of wood was placed under the feed spout and next to the first corundum wheel. Later the feed screw was used. It seems evident that some device—blades with slanting edges, a screw-shaped block, or a feed screw—is useful to start the seed in the right direction and push them through the machine. The patent pointedly provided that they should enter at one end and be discharged at the other. The feed spout being kept full, gravity and the motion of the machine would cause the seed to go in the direction intended toward the outlet. The evidence shows, however, that the use of the feed screw or some equivalent device is of advantage in pushing the seed from the inlet to the outlet. In the construction of the machine Thomas would not be confined to making an exact copy of his drawings and specifications. It would be almost impossible to insert in the drawings and description every detail. If the drawings and description furnished are sufficient for a mechanic skilled in the art to construct the device patented, they are sufficient.

We are of opinion that the failure to show a feed screw or an equivalent device in the drawings or the patent does not invalidate the patent.

Eighteen patents have been put in evidence as anticipations of the Thomas delinter. They include patents for grain scourers, for bolting flour, for shaft hangers, for cleaning cotton seed, and several for de-

linting cotton seed. It is unnecessary to examine each of them separately to point out the differences between them and the Thomas machine. Generally, those of them that are intended to be delinters rely on the abrasion of the seed by two rough surfaces, whereas one main idea of the Thomas delinter is that the cotton seed shall be held by a smooth surfaced casing close to the corrugated corundum wheels. The conception of avoiding all roughness or abrading quality on the part of the casing is not evidenced in any one of the patents or machines prior to 'Thomas'. In his specifications it is said: "In constructing the perforations which form the lint outlet, care should be taken to avoid projections, roughness, or anything calculated either to interfere with the movement heretofore referred to of the annular body of seed or with the escape of the lint." The prior patents, on the contrary, usually rely on making both surfaces that come in contact with the seed rough, or in some way fashioning them that both surfaces should serve in taking the lint from the seed. The record, we think, shows that the delinting is successfully performed when the seed are held by a nonabrading smooth surface close against the delinting cylinder, and it is not shown that machines relying on two abrading surfaces have been successful. The prior patents that in some respects slightly resemble the Thomas delinter are wholly wanting in the devices necessary to continuously and successfully do the work of delinting. They are not susceptible of a continuous feed, or they do not separately discharge the seed and the lint, or they do not provide for the feed at one end and the passage of the seed through the machine lengthwise the machine and the discharge continuously of the delinted seed at the other.

The grant of letters patent for the Thomas delinter is *prima facie* evidence that Thomas was the inventor of the device described in the letters and of its novelty. *Cantrell v. Wallick*, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017. The burden, therefore, was on the defendant to sustain the defense that the invention had been anticipated and want of novelty.

The evidence does not leave us in doubt that the Thomas delinter was operative. Dr. Thomas testifies that on the first machine made he and others delinted two car loads of seed. About 40 of the machines were made, and the evidence shows that several of them were operated successfully.

The statute provides that "any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, * * * may * * * obtain a patent therefor." Rev. St. 4886 [U. S. Comp. St. 1901, p. 3382].

Without considering the claims asserted as new processes or methods, we are of opinion that the evidence shows that Thomas invented a new and useful machine, although it is a combination of known elements, and that the invention has novelty and utility. The fact that the machine is an aggregation of known devices does not show that it is lacking in novelty. A machine is of necessity made of known things. The originality is often in the new combination. In no prior delinter do we find united all of the attributes of 'Thomas', nor is it shown that any prior delinter produced the desired results. It cannot be said, we

think, that it is lacking in novelty, unless the combination he made was one so obvious that it would occur to any one skilled in the art. That the combination is not one evident and easily seen is shown by the fact that Delamare, Gennert, Crawford, and others struggled unsuccessfully to produce a practical working delinting machine. The court is of opinion that the Thomas patent, No. 503,103, is a valid patent for a mechanical device for delinting cotton seed, shown by the drawings, patent, and claims from 5 to 8, inclusive.

2. The remaining question is as to the infringement. There is no conflict in the evidence that the defendant has made, used, leased, and offered to lease a machine called the Baxter delinter, which is described in patent No. 659,840. Models of both machines have been before the trial court and are before this court. The question of the validity of the Baxter patent is not before us for decision. It might be a valid patent as an improvement of the Thomas delinter, and yet an infringement of the Thomas patent, in so far as it copies and appropriates the invention of Thomas. "Two patents may both be valid when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent." *Cantrell v. Wallick*, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017. We are aided in the examination of this question of infringement by the evidence of experts, but their opinions are not conclusive. We must form our own opinion, based on all the evidence. With the two patents and the drawings and models before us, aided by the other evidence in the record, we are required to decide the question of infringement. *Hardwick v. Masland* (C. C.) 71 Fed. 887.

Both machines are constructed with a central horizontal shaft, supported by frames. In both machines on the shaft is formed a cylinder composed of a series of corundum wheels, mounted side by side, and containing circular grooves. In both stirrers are arranged between the corundum wheels to stir and lift the seed as the corundum cylinder revolves. Both machines have the perforated casing with the smooth interior surface, the perforations being of a size to permit the passage of the lint, but not the passage of the seed. In both machines there is an inlet for the seed at one end, and an outlet for the delinted seed at the other end. And both machines make the same provision for the continuous ingress of the seed, their passage through the machine lengthwise the machine, and the continuous egress of the delinted seed. Mr. Brown, the defendant's expert, in giving evidence as to the operation of the Thomas machine, did not have access to a Thomas machine. A sentence from his evidence shows how easily he changed a Baxter machine into a Thomas machine. He said:

"No machine like the Thomas patent being available, it was necessary to reconstruct one of the Baxter machines so as to approximate the structure of the Thomas machine. Accordingly, one of the Baxter machines was dismantled, and the alternating stones and toothed rings were slipped off from the shaft of the rotating drum, and the feed screw removed, and then there was slipped onto the shaft in alteration stones and metal rings carrying teeth which were not beveled in accordance with the Baxter patent, and which were not spirally disposed."

These changes made the Baxter machine "substantially" like the Thomas machine.

An examination of the models, the drawings, and patents, and the descriptions of the two machines by the experts, show that in their mechanism and in their practical operation they are substantially the same. The only differences worthy of note, and in these respects the Baxter machine may be an improvement on the Thomas delinter, are that the casing in the Baxter machine is made somewhat larger in diameter at one end than at the other, and that the perforations at one end of the casing are made somewhat smaller than at the other; that the stirrers are shaped and arranged somewhat differently in the Baxter machine, and probably tend to push the seed along the cylinder more than those provided for in the Thomas patent; that the location of the seed outlet is slightly changed, and a swing door used to regulate the outflow of the seed; and a feed screw is used at the end of the corundum cylinder under the feed spout, Thomas having used blades with beveled faces. These changes may be substantial improvements, but the Baxter machine embraces the invention made by Thomas. There is no substantial part of the Thomas machine that is not reproduced in the Baxter delinter. If it be conceded that improvements are added, it is nevertheless an infringement. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Simmons v. Standard Oil Co.* (C. C.) 62 Fed. 928; *Robbins v. Dueber Mfg. Co.* (C. C.) 71 Fed. 186; *Pennington v. King* (C. C.) 7 Fed. 462.

Our conclusion is that the complainant has a valid patent, which the defendant has infringed.

The decree of the Circuit Court dismissing the bill must therefore be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is so ordered.

(128 Fed. 724.)

KLAUDER-WELDON DYEING MACHINE CO. v. STEADWELL DYEING MACHINE CO. et al.

(Circuit Court of Appeals, Second Circuit. March 29, 1904.)

No. 124.

1. PATENTS—INFRINGEMENT—DYEING APPARATUS.

The Weldon patent, No. 354,281, for a dyeing apparatus, though not for a pioneer invention, was not anticipated, and shows patentable invention. Claims 1, 2, 3, and 4 also *held* infringed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon appeal from a decree of the Circuit Court, Northern District of New York, holding United States letters patent 354,281, December 14, 1886, to Leonard Weldon, for dyeing apparatus to be valid, and its first four claims to be infringed by a machine manufactured by defendants. The opinion of the Circuit Court is reported 122 Fed. 640.

Frederick W. Cameron, for appellants.

F. P. Warfield, for appellee.

Before LACOMBE and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The specification states that the invention relates to the class of dyeing apparatus designed for dyeing textile fabrics, and in which a rotary wheel or cylinder is arranged in the dye vat to intermittently dip the articles to be dyed into the dye-liquor; and the invention consists in an improved construction and combination of the component parts of the dyeing apparatus, whereby its efficiency is materially improved. It will not be necessary to set forth all the details of the apparatus. The following excerpt from the specification and Fig. 3 sufficiently describe it:

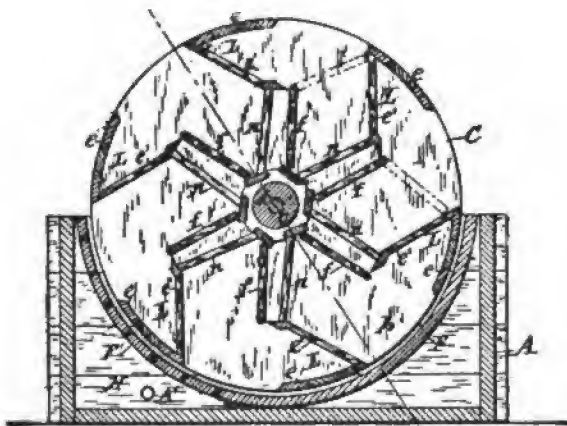


Fig. 3.

"The cylinder, C, I form of two stout heads, b, b (not shown in this figure), * * * secured to a wooden roller, c, through which the shaft, d, of the cylinder is extended and to which it is fastened. Lengthwise the interior of the cylinder, C, are extended a series of buckets, L, L, which are secured at their ends to the inner sides of the heads, b, b. These buckets are formed either V-shaped, or of similar angular shape in cross-section, and are arranged adjacent to the periphery of the cylinder, and preferably in such positions as to make one side, e, of each bucket, form a longitudinal section of the exterior of the cylinder, said side of the bucket being solid, while the other side, e', is perforated or composed of slats placed short distances apart. From the inner edge of each bucket, L, toward the center of the cylinder is extended a slatted or perforated partition, n, and near the aforesaid edge of each bucket is hinged at one edge a gate, f, which has its free edge extended toward the back of the adjacent bucket.

"In operation * * * the fabric or articles to be dyed are thrown into the buckets, L, L, from the top of one side of the vat, and by the rotation of the cylinder, C, said articles are carried in the buckets through the dye-liquor in the vat, and are thus intermittently dipped or immersed therein. The angular or V-shape of the buckets causes the articles to be retained in the buckets after leaving the bath of dye-liquor without moving from the positions in which they were taken up until the buckets are elevated to a position past a vertical line over the axis of the cylinder, C, when the aforesaid articles fall by gravity out of the elevated bucket and onto the back of the perforated side of the subjacent bucket and partition, n, and during this fall the articles

to be dyed are turned over, so that in their succeeding passage through the dye-liquor and toward the top of the cylinder the dye-liquor penetrates the layers of fabric in the buckets in opposite direction from which it passed through the same during the previous revolution of the cylinder, and thus the fabric is dyed more uniformly throughout. Heretofore the buckets of the wheel or cylinder have been formed concave or rounded transversely, and this form of the buckets caused the articles in process of dyeing to be rolled over in the bucket, and thus become more or less entangled or knotted in a mass and dyed unevenly. This, it will be observed, is effectually obviated by the angular or V-shape of the bucket, L, L."

The claims relied on are:

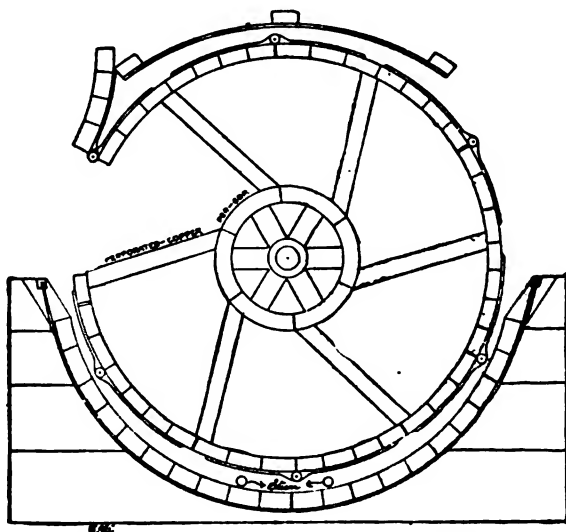
"(1) In a dyeing apparatus the combination with the rotary wheel or cylinder, of buckets formed angular in cross-section, as and for the purpose specified.

"(2) In a dyeing apparatus, the combination, with the rotary wheel or cylinder, of buckets in said cylinder adjacent to the periphery thereof, and of angular form in cross-section, substantially as shown and set forth.

"(3) In a dyeing apparatus, the combination, with the rotary wheel or cylinder, of buckets of angular form in cross-section and adjacent to the periphery thereof, and perforated partitions extending from the inner edge of the buckets toward the center of the wheel or cylinder, substantially as described and shown.

"(4) In a dyeing apparatus, the combination with the rotary cylinder, of buckets of V-shape in cross-section, and having one side solid and the other side perforated, and the solid side thereof constituting a longitudinal section of the exterior of the cylinder substantially as described and shown."

We are not satisfied from the evidence that the patentee was a pioneer in the art, nor that it is due solely to his improvement that the old method of stirring the fabric in the vat with poles has given place to the revolving cylinder. Nevertheless we concur with the judge who tried the cause at circuit in the conclusion that no anticipation has been shown, and that the combination of the patent exhibits patentable invention. The only important question in the case is whether defendants' structure infringes. That structure is shown in the following cut:



The specification very clearly indicates what is the distinctive feature of the combination covered by the first four claims. It is found in the buckets, "formed either V-shaped or of similar angular shape in cross-section." The precise degree of angularity is not stated, but it must be sufficient to enable the buckets to discharge the function which differentiates the operation of the machine of the patent from what the patentee asserts was the operation of earlier machines. The buckets are so arranged that, after the fabric is lifted above the dye-liquor in the vat, it is retained in the bucket till it reaches such a height that the action of gravity will cause it to move from the face of one bucket to the back of the next preceding one, in such a way that the portion of it which has just passed through the dye-liquor resting on the perforated or slatted side of the bucket will re-enter said liquor entirely exposed thereto. Moreover, this change of position, or "turning over," as the patent expresses it, is to be accomplished without allowing the fabric to be rolled over in the bucket, or entangled or knotted in a mass. Inspection of Fig. 3 of the patent shows a degree of angularity which will hold the fabric in the bucket until the bucket has moved "past a vertical line over the axis of the cylinder"—which is the phrase used in the patent; but the claims do not specify any particular degree of angularity, and, although the patent is not a pioneer one, they may fairly be construed to cover buckets whose angularity is such as to carry the fabric so close to the vertical that the change from face to back of bucket will be accomplished with sufficient quickness, and with so slight a movement within the bucket as to avoid the fabric's being rolled over with consequent knotting and entanglement. Looking now at the defendants' machine, it may fairly be held, as complainant's experts contend, that the portion of each compartment which lies in the acute angle formed between the perforated partition and the periphery of the cylinder is substantially a bucket, in which the fabric is held as it is pushed during the lower part of its revolution through the dye-liquor. This bucket has an angularity of shape. It possesses more of a V-shape than it would if the perforated copper partitions were arranged radially from the axis instead of being pitched backward 30° off the radius. Does the angularity thus produced between the periphery and the partition operate to dispose of the fabric during the upper part of its revolution substantially as the bucket of the patent does, and in substantially the same way? Looking at the drawing, it is manifest that the tendency to slip down, bunch, and be rolled over which would result from the use of radial partitions is largely reduced; but the impression was formed at the argument that the angle was not sufficiently acute to produce the operation described in the patent. It is apparent, however, that the quantity of fabric placed in a compartment and the speed of rotation of the machine are factors to be considered. Unfortunately, no working model is produced, and without one it is difficult to determine just what will happen during revolution of the cylinder. We can only consider the testimony on both sides, and dispose of the question according to the weight of evidence.

On this branch of the case the complainant called three witnesses. Goodlet, the expert, had never had any practical experience in the use of dyeing machines. He testified that in defendants' structure the

V-shape of the pockets or buckets causes the material to be retained in them after leaving the bath without substantially changing its position in the buckets until they are elevated to near a vertical line over the axis of the drum, when the fabric falls by gravity from said position upon the back of the preceding bucket. During this fall of the material said material is turned over so as to present a different side to the dye-liquor as the material again enters the bath. "I understand," he says, "that this change in the position of the material is effected without causing said material to roll over and become entangled or wadded." Asked, on cross-examination, if the goods to be dyed, if placed in the bucket formed by the acute angle, would be retained in the bucket until it reached a point past a vertical line over the axis, he replied: "Possibly not. I am not able to say positively, not having experimented with such a machine. But I think it would at least be retained in the pockets until they were in close approach to said vertical line, * * * and I think it would be turned over. It is possible it might slide to some extent on the partitions of the bucket." On redirect, comparing defendants' machine with prior patents in which there were radial partitions, he says that in these earlier machines the fabric would begin to move much quicker, and would roll over and over, so as to become knotted and matted, while in defendants' machines, with partitions 30° off the radius, "the goods are carried well up toward the vertical position before they begin to move, and then they move quickly inward and over at once onto the back of the preceding partition, so that any rolling action of the material which would tend to mat and knot is prevented. * * * The partitions would not reach a horizontal position until the inner ends thereof have reached a point 60° or less from the vertical. * * * It is the purpose of inclining the partition, in both complainant's and defendants' machine, broadly to prevent movement of the stock within the pocket until the rear partition of the pocket has moved a substantial distance from the horizontal toward the vertical line, in order that the movement of the stock, when such movement begins, may be such as to prevent knotting and matting, whether that movement is against the front partition or toward the center of the machine."

Complainant's next witness, Whitely, was a boss dyer; a practical man, who had used both machines. He testified that the incline of the lower wall of complainant's bucket serves to keep the stock from rolling into a ball, which would mat and full, and keeps the stock in good condition. It holds the stock from falling until it has passed the top of center. Of the defendants' machine he says it "operates in the same way [as complainant's], and the incline tends to serve to keep the stock in good shape for processes to follow. * * * It would keep the stock from rolling around and matting and fulling." How it operates to do so he does not particularize.

Complainant's next witness—Sjostrom—was a practical dyer, who had used complainant's machine. Describing its advantages, he said that the incline holds the goods in position until the pocket obtains almost its vertical, "when they are gradually and slowly slid or let drop into the dye-liquor again, thereby keeping the wool free from matting and the garments from rolling up. * * * By the wool or

garments falling out of the pocket after it has crossed the vertical, instead of sliding or falling towards the center of the machine, it drops or falls out near the periphery of the cylinder, thereby causing wool or garments the chance of the tendency to spread and open out," which he considers an important advantage. He never saw one of defendants' machines in operation, but, examining the drawing, testified that, in his opinion, its operation would be the same as that of complainant's. On cross-examination he said that the pockets in complainant's machine hold all that is placed in them till the contents are slid or dropped out, and admitted that, if the defendants' pocket or compartment was filled, "it will remain so; it [the stock] doesn't move at all, [except for] a setting or sliding movement toward the centre of the machine."

The defendants' expert Curtis testified that he had carefully examined and witnessed the operation of one of defendants' machines. He says: "A quantity of stock [how much he does not state] is inserted in a chamber or compartment, * * * and as the drum is, slowly rotated the stock slides successively inwardly along one of said partitions until it engages the hub cylinder, along the surface of the hub cylinder until it engages the partition on the opposite side of the chamber, outwardly along the last-mentioned partition until it engages the peripheral wall of the cylinder, along which it slides until it again engages the first-mentioned partition. This movement of the stock is repeated with each rotary movement of the cylinder. * * * The stock has no falling movement, and no other movement except a slight rotary movement, due to the fractional retardation of that side of the wedge-shaped mass of stock which is in contact with the wall of its inclosing chamber." He further testified that the machine he observed was provided with a reversing gear, and was operated first in one direction and then in the opposite direction, and that, in whichever direction it was rotated, "the stock had moved inwardly, along its supporting partition, sufficiently to be out of contact with the periphery of the cylinder by the time the partition had assumed a position downwardly and inwardly at an angle of about 30° to the horizontal." He said that he was unable to distinguish any difference whatever in the movement of the stock within its chamber, due to the inclination of the partitions. From this statement it may be inferred that his observations were conducted when the cylinder was revolving very slowly.

The defendants also called a practical dyer, who was familiar with the operation of both machines. His first description thereof is not clearly expressed. Apparently some words have been omitted either in taking down or in transcription. Further on he states that there is no practical advantage in making the partitions at an angle to the radius; that when the pocket of defendants' machine rises above the water, and reaches a point where the partition leaves the horizontal, the liquor and stock begin to slide towards the center; and that, "as he should judge," when about eight or ten inches above the horizontal, the stock has slid away from the periphery. This witness testified that in operating defendants' machine the compartments are filled with dry stock, which, when wet, occupies about three-quarters of the space.

All this is not especially helpful. On the whole, we have reached the conclusion, as did the Circuit Court, that by reason of the angularity or

the inclination of the partitions the latter become shelves, which, when the machine is operated at a proper rate of speed, will elevate the goods to be dyed so far above the dye-liquor, without substantially changing their position, that within the short distance left to be traversed before the partition begins to descend the position of the goods is shifted from one partition to another, so as to present a different surface to the dye-liquor, with sufficient quickness to avoid the bunching, matting, and knotting which the patentee sought to prevent.

The decree is affirmed, with costs.

(128 Fed. 730.)

HAMMER et al. v. CUTLER-HAMMER MFG. CO. OF WISCONSIN et al.*

(Circuit Court of Appeals, Seventh Circuit. January 5, 1904.)

No. 999.

1. PATENTS—INFRINGEMENT—ELECTRIC SWITCH FOR MOTORS.

The Blades patent, No. 418,678, for an electric switch for motors, was not anticipated, and discloses patentable invention. Claims 1 and 4 also *held infringed*.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For opinion below, see 124 Fed. 222.

This is an appeal from a decree adjudging appellants to be infringers of claims 1 and 4 of letters patent No. 418,678, January 7, 1890, to Blades, assignor, for an electric switch for motors.

Claim 1 is as follows: "(1) In a shunt-wound electric motor, the combination, with the field-circuit, of a magnet in said circuit, a hand-switch adapted to open and close the armature-circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and means for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current through the field magnet, substantially as described."

Claim 4 is the same, except that the means for retracting the switch to its initial position is limited to a spring.

The opinion of the Circuit Court, reported in 124 Fed. 222, cites the prior patents.

Francis W. Parker, Edward Rector, and Donald M. Carter, for appellants.

W. Clyde Jones and Keene H. Addington, for appellees.

Before JENKINS and BAKER, Circuit Judges, and BUNN, District Judge.

BAKER, Circuit Judge. The record shows that between 1880 and 1890 there was a rapid development of the electric motor for commercial uses. The series motor, in which the whole current passes in direct connection through the field and the armature, and in which therefore a varying load on the motor in a constant potential circuit would produce changes in revolution from a possibly excessive speed under no load to an undesirable slowness under full load, was found serviceable in cases where the load was constant, or where, the load being

* Petition for rehearing dismissed March 30, 1904.

variable, an attendant was continuously at hand to adjust the current to the load. For factory use, where machines and tools, to perform their functions properly, are required to run at a fixed speed irrespective of changes of work from moment to moment, something steadier was sought, and it was found in the shunt-wound motor in a constant potential circuit, in which the current is divided before entering the motor, the major portion passing through the armature and the minor through the field. At first the shunt-wound motors were made with high resistance armatures to prevent their being burned out when the current was turned on and before the motor had developed its counter electric pressure to protect itself. These motors came nearer the mark of self-regulation than the series kind, because the field, being in shunt, was independent of the varying stress on the armature; but the high resistance in the armature, the rotational energy of the field-magnet remaining constant, left the speed somewhat subject to variations of the load. At this stage of development, several inventors gave their attention to devising governors or regulators. It was next discovered that a shunt-wound motor with an armature of the least practicable resistance was virtually self-regulating under varying loads. But this type was especially susceptible to being burned out at starting and before the motor had acquired a protective speed. So the starting-box, or hand-switch, was inserted in the armature circuit, and its sufficient resistance to the current could be cut out gradually by moving the switch-arm from one contact point to another, until, when the current was fully on, the motor would be in a state of self-defense.

The self-regulating shunt-wound motor with starting-box had been in commercial use some considerable time before Blades entered the field. It was attended with these dangers: The accidental opening of the field circuit, which would likely be destructive of the armature; the leaving of the switch-arm on an intermediate contact point, which would destroy the starting-box, as its resistance coils were not intended nor adapted to be left in circuit; and the failure to return the switch-arm to its initial position, whereby, if the motor should stop on account of the current's being cut off by the opening of a switch at the factory or at the central station, or by the blowing out of a fuse, or diminished by a sufficient drop of potential, and if the current were then turned on or the potential restored, the low resistance armature would be burned out. Manufacturers, with whom were associated some of the greatest inventors and students in the electrical world, well understood and warned their customers against these perils.

The structure portrayed by the patent in suit not only protects the motor and the starting-box from all the aforesaid dangers, but affords additional benefits by effecting an instantaneous release when the field circuit is broken, and a delayed release when the current supply is cut off. This device won immediate recognition and went into general commercial use.

The bringing together, within the mental vision, of these manifold difficulties and the means for overcoming them all, and conferring new advantages, we think evinced a high degree of invention, unless the prior art showed the way and left no room for initiative. To give the results of our examination of the prior art, we think it unnecessary

to detail the structures of the reference patents. The shunt-wound motor with low resistance armature and hand-switch or starting-box was old. The electro-magnet dated back to the beginnings of the electric art. Springs of one sort or another had been employed in various arts, including the electrical.

In regulators for electric generators, and in governors for motors with high resistance armatures, magnets and springs had been balanced against each other on the contact-arms of resistance-coils that were left permanently in circuit, so that a loss in current, by diminishing the energy of the magnet, would permit the spring to pull the contact-arm to a point of less resistance, and vice versa, thus producing a floating switch. The inventors of these devices had not in mind the problem Blades solved, for it had not yet arisen, and the means they applied to their problems will not obviate the perils that were found to attend the shunt-wound motor with low resistance armature and manual starting-box.

In cases where it was desired to start a motor at a distant point without an attendant, a pulling magnet, energized when the current was turned on at the central station, was used to pull, as would the hand of a present operator, the contact-arm of the starting-box from its off to its on position. In these automatic starters no spring is opposed to the magnet. In automatic starters, as such, an opposed spring would be worse than useless; for, the end to be attained being the pulling of the switch-arm from its off to its on position, any force that resists is counter to the object in view. These inventors therefore designedly left out the spring from their combinations as being an element hostile to the accomplishment of their purpose. And if a skilled mechanic, desirous of adding the protective functions of the patent in suit to the function of the automatic starter, had opposed a spring to the pulling magnet in the field circuit, he would have found that the magnet, to be strong enough to pull the switch-arm through its arc against the resistance of the spring, would draw off so much energy from the field that the armature would speed up to a degree that would make the motor commercially inoperative. Not only are starting and stopping opposite operations, but just as there is a material difference between the field-magnet and the pulling magnet of the automatic starter (though magnets are magnets) so we think there is a vital distinction between the pulling magnet of the automatic starter and the retaining magnet of the patent in suit.

Dangers to a motor in operation may arise from an excessive current. The fuse is the ordinary protective device. Certain inventors employed pulling magnets, put into action by the excess of current, to shut down the motor. These overpressure protective devices are inert in the presence of the dangers that threaten from underpressure or no pressure. Their devisers were considering a different problem, and the structures themselves are incapable of filling the office of the instrument described in appellees' patent.

One inventor, preceding Blades, addressed his attention to the dangers to a self-regulating shunt-wound motor in a constant potential circuit that come from a cessation or material loss of current, but missed the mark by directing his efforts to the wrong point, the main

switch. As we read the Shepardson patent, it contains no hint of the Blades structure.

The prior art contains no equivalent combination. We think that there was patentable novelty in the application of an underload retaining magnet to a manual starting-box, in the location of such a magnet in the field circuit of a self-regulating shunt-wound motor, and in adjusting it to act in that location with the starting-box located in the armature circuit. We find nothing in the prior art to militate against the allowance of the claims in suit.

Appellants insist that these claims, which limit the location of the magnet to the field circuit of a shunt-wound motor, must fall by reason of amendments made while the application was pending. The original specification located the magnet "preferably in the field circuit." The field circuit, as distinguished from the armature circuit, implies the shunt-wound motor. No matter, therefore, how broad the applicant made the original description of his invention, the narrowing of the specification and the limitations of the claims in suit left the invention as now claimed within the preferred range of the original specification.

We think the record contains sufficient evidence of infringement. The decree is affirmed.

(128 Fed. 863.)

THE MATTERHORN.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1904.)

No. 968.

1. ADMIRALTY—PROVING LAW OF FOREIGN COUNTRY.

Where the maritime law of a foreign country, which is different from our own, is relied upon to defeat an action, it must be both alleged and proved.

2. SEAMAN—INJURY IN SERVICE—LIABILITY OF SHIP FOR NEGLIGENCE TO FURNISH CARE AND TREATMENT.

Under the maritime law of the United States a suit may be maintained by a seaman against the ship to recover damages for the neglect of the master to furnish him proper care and medical attendance after he was injured by being assaulted by the master.

Appeal from the District Court of the United States for the District of Oregon.

The appellee, a subject of the kingdom of Norway and Sweden, was an able-bodied seaman on the ship *Matterhorn*, having shipped at Hamburg for a voyage therefrom to Portland, Or., and other ports. He filed his libel alleging that while on the voyage he was beaten and kicked by the master for failure to respond to a signal to go aft; that he was seriously injured and ruptured by the assault; that the master failed to furnish him medical care or attendance, but compelled him to perform his usual duties, whereby his injury was greatly aggravated and rendered more difficult to cure; and that by the negligence of the master as aforesaid he has become permanently disabled. The answer denied all of these allegations of negligence and maltreatment, but it admitted that on account of the failure of the appellee to obey a signal to go aft the master, while under great provocation, struck him once

upon the face. The answer then proceeded to allege "that the ship flies the British flag, and is owned wholly by British subjects, and that the act of the master, as aforesaid, was permissible under British law." The court found upon the evidence that the master assaulted the appellee, threw him upon the deck, and with force kicked him in the lower portion of the abdomen so that he was badly and permanently ruptured; that thereafter the master failed and neglected to properly care for him, or provide him with proper treatment and attendance, and, with the exception of a few days, compelled him to perform the usual duties of an able-bodied seaman; and that by reason of such neglect the appellee was damaged in the sum of \$500, which sum was decreed to be a lien on the ship.

Williams, Wood & Linthicum, for appellants.

V. K. Strode, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Much of the discussion on the appeal relates to the appellants' contention that by the law of Great Britain the ship was under no obligation to care for or cure a seaman injured in her service, and was not subject to a lien for damages resulting from the master's neglect to furnish such care or medical attendance. We find it unnecessary to consider this question, for the reason that the British law upon the subject is neither pleaded nor proven. It is not even shown that the *Matterhorn* is a British ship. The answer, it is true, alleged that she flies the British flag, and is owned by British subjects, but no proof whatever was offered to sustain that averment, nor is there anything in the evidence tending to show that it was true, except that one of the witnesses for the appellee, who was also a member of the crew, was on cross-examination asked the question if he had ever before sailed in a British ship. But, if such proof had been made, it would not have dispensed with the observance of the rule that, where reliance is placed on a foreign law different from our own, it must be alleged and proven. *The Montana* (C. C.) 22 Fed. 728; *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 445, 446, 9 Sup. Ct. 469, 32 L. Ed. 788. It is true that the appellants introduced in evidence the British merchants shipping act of 1894, but no particular portion of it was either designated or embodied in the record, nor is there anything to show that it was offered for any purpose, except to sustain the only allegation of the answer referring to it—that the violent act of the master was permissible under its provisions.

The contention is made that by the decision in the case of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 433, 47 L. Ed. 760, the Supreme Court has undermined the doctrine that a ship is subject to a lien for damages for neglect of her master to furnish proper care and medical attendance to a seaman injured in her service. Our views concerning that contention have been expressed in the case of *The Troop* (decided at the present term) 128 Fed. 856, 63 C. C. A. 584, and we find it unnecessary to add to what is there said.

Nor do we find ground for disturbing the findings of fact of the District Court, before whom the greater portion of the testimony was taken. They were findings made upon conflicting evidence, and will

not be reviewed in this court unless they are clearly shown to have been wrong. *Jacobsen v. Lewis Klondike Expedition Co.*, 112 Fed. 73, 50 C. C. A. 126, and cases there cited.

The decree of the District Court is affirmed.

(128 Fed. 865.)

LINCOLN et al. v. LEVI COTTON MILLS CO.

(Circuit Court of Appeals, Second Circuit. March 4, 1904.)

No. 84.

1. BROKERS—AGENCY FOR BOTH PARTIES—CONTRACT OF SALE.

In an action for breach of a contract of sale, the entire correspondence between defendants and the sellers showed that both parties understood that defendants were middlemen, who had regular customers for whom they sold goods like those in question, and other regular customers for whom they bought. *Held*, that there was no impropriety in such double agency.

2. SAME—UNDISCLOSED PRINCIPAL.

Where defendants sold certain yarn for plaintiff, and, on demand, refused or neglected to disclose the name of the buyer after deliveries had been refused, defendants thereby became personally liable on the contract.

3. SAME—BREACH.

Where brokers made a contract for the sale of yarn for plaintiff to an undisclosed buyer, and, while the contract was being carried out and deliveries made, the brokers requested a suspension of deliveries until further notice, and subsequently advised plaintiff that their customer had notified them that he would not receive any more goods under the contract, on account of the quality of the goods previously delivered, such notice constituted an unconditional breach of the contract.

4. SAME—DAMAGES.

Where yarn was sold by a manufacturer through a broker, the manufacturer, on a breach of the contract by the buyer, was not bound to sell the yarn in the open market, and hold the buyer for the difference between what he realized from such sale and the contract price, but was entitled to recover the profit he would have made if the buyer had not prevented the performance of the contract, less the profit actually received from the sales to others.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, against the plaintiffs in error, who were defendants below. The judgment was entered upon the verdict of a jury, which was directed by the court. The action was brought to recover upon a contract in writing whereby the plaintiff agreed to manufacture certain cotton yarn, and to deliver the same in weekly installments for the sum of 27 cents per pound. It was charged as a breach that the defendants refused to permit plaintiff to proceed with the manufacture and delivery of the goods.

¶ 2. See *Brokers*, vol. 8, Cent. Dig. § 140.

Howard A. Taylor, for plaintiffs in error.

H. C. Bernstein, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. For a considerable time prior to the transactions complained of, defendants' firm had been acting as commission merchants for the plaintiff—selling the plaintiff's goods, making advances thereon, and collecting the accounts therefor.

The following letters and telegrams passed between the parties, evidencing the "written contract" declared upon:

(1) Defendants to plaintiff (telegram) February 21, 1900:

"May we sell 25,000 to 50,000 pounds thirties two-ply skein twenty-seven cents deliveries following present orders. Please wire quick answer."

(2) Plaintiff to defendants (telegram) same date:

"Sell 25,000, two thousand weekly, 50,000 three possibly four commencing about Aug. 1st: confirm."

(3) Defendants to plaintiff (letter) same date:

"We wired you to-day as follows [quoting the telegram supra] which we now confirm, hoping to have prompt reply."

(4) Defendants to plaintiff (letter) February 23, 1900:

"We have your telegram of the 21st [quoting it]. In reply to this will say that we are negotiating with our customer, but fear that the distant deliveries will prevent our booking for this particular party."

(5) Defendants to plaintiff (telegram) February 26, 1900:

"We have sold for your account 50,000 thirties two-ply skein, 4,000 lbs. weekly August delivery twenty-seven cents."

(6) Defendants to plaintiff (letter) February 26, 1900:

"We enclose order No. 40 for 47,200 pounds No. 30, two, which we have closed in accordance with your telegram, and we are wiring you to this effect to-day. This customer would like weekly deliveries to begin earlier than August: and to have the weekly amount run up to 7,000 pounds per week. We told him, if we could possibly arrange it, deliveries would begin earlier than August and also if the amount could be increased this should be done."

The "order No. 40," which was inclosed, reads as follows:

"Feb. 26, 1900. Sold for account of Levi Cotton Mills 47,200 lbs. 30 two skein * * * same as order No. 10 27 cents. * * * Deliveries 4,000 lbs. weekly Aug. 1. * * * Ship to Catlin & Co., Pascoag R. I.

"Catlin & Co."

On March 3, 1900, defendants directed shipments to be made to Warren, Mass., or Pawtucket, R. I.

(7) Defendants to plaintiff (letter) April 4, 1900:

"This order was originally taken for 50,000 lbs. but in estimating the amount due on our customer's order, the order was sent to you as 47,000 lbs. We have a letter from this customer asking us to change the order to 50,000 lbs. Kindly arrange to make this change. If there is any objection to your doing so, we should be glad to have you advise us and we will notify our customer."

This increase to 50,000 was accepted by plaintiff on April 5th.

Subsequently, when controversy arose, the plaintiff requested the defendants to give the name of their customer who purchased order No. 40, but the request was ignored.

This detailed statement of the correspondence disposes of the first point here argued. Catlin & Co. were agents of the plaintiff to effect sales of yarn. They were also agents of other persons who wanted to buy yarn. Document No. 7, *supra*, is illuminative of the situation. Manifestly, one of their purchasing customers had applied to defendants to get him a large quantity of yarn. Some they had bought elsewhere, and, upon finding the terms satisfactory, they ordered from plaintiff enough to make up the unfilled balance of their customer's order to them. The entire correspondence shows that both sides understood that defendants were middlemen who had regular customers for whom they sold, and other regular customers for whom they bought. There was no impropriety in such double agency, it being clearly understood by both parties. *Talcott v. Chew* (C. C.) 27 Fed. 273; *Butler v. Thomson*, 92 U. S. 414, 23 L. Ed. 684. Having made the contract as agents for an undisclosed principal, and refusing or neglecting to disclose such principal when called upon, they became themselves personally liable on the contract.

The second point advanced by defendants, namely, that the proof fails to show that defendants broke the contract, may be similarly disposed of. On June 4, 1900, defendants wrote to plaintiff that they had received word from their customer that, owing to some change in the market conditions, such customer wished shipments withheld for a time. To this plaintiff replied that it could hold up as long as defendants have some of the other orders for it to work on. On July 5th defendants wrote that the customer was objecting to the mixtures which he had been finding in the yarn, and that he would not want any deliveries before the 1st of August, at least. And again on July 11th that he "has had so much trouble with the yarn that he has notified us that he would not receive any, but we have refused to accept cancellation of the order. Please do not start on this until we advise you." To this plaintiff replied, calling attention to the fact that the customer was complaining before plaintiff had commenced shipping. Subsequently, on September 8th, it wrote to defendants, "How is customer's pulse on 40 order on which you asked us to hold up until further notice?" To this defendants on September 11th replied: "Our customer, order No. 40, has advised us he will not receive any more yarn on that contract on account of the quality of yarn which we have been delivering him." Certainly there was nothing equivocal or indeterminate about this statement. It was the positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract which the authorities require. *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Marks v. Van Eeghen*, 85 Fed. 853, 30 C. C. A. 208. We do not find in the further correspondence—either in that portion which was admitted in evidence, or in the part which was excluded—anything which can be construed as a waiver of plaintiff's right to elect to treat this renunciation of the contract as a breach which terminated it.

Some minor points which have been cursorily stated in the brief need not be discussed at length. There was not sufficient evidence

to send the cause to the jury on any theory of an accord and satisfaction covering this claim. The testimony of the witness Burnstine showed quite clearly that the negotiations and payment relied upon to make out this defense related to another matter. As to the measure of damages which was applied, the court followed the rule laid down in *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967. There was no conflict of evidence as to the items of cost, nor anything in the cross-examination of plaintiff's president which would have warranted the jury in rejecting his statement of such items.

The judgment is affirmed.

The following is the opinion of the court below:

WHEELER, District Judge. This is a motion to set aside a verdict directed by the court. The complainant alleges that "The above-named defendants entered into a contract in writing with the plaintiff, whereby the plaintiff agreed to manufacture for the defendants, at their special instance and request, certain goods, wares, and merchandise, consisting of fifty thousand (50,000) pounds of cotton yarn, and to deliver the same in weekly installments of four thousand (4,000) pounds each, beginning August 1, 1900, for which these defendants agreed to pay to the plaintiff the sum of twenty-seven (27) cents per pound." "And that the defendants refused to permit the plaintiff to proceed with the manufacture and delivery of such goods as in said contract provided, and continued so to refuse to permit the said plaintiff to manufacture and deliver the said goods, or any part thereof." In their answer, after denial of the contract and breach, "the defendants allege that for a considerable period prior to October 26, 1900, they had been acting as commission merchants for the plaintiff, selling the plaintiff's goods, making advances thereon, and collecting the accounts therefor."

Negotiations began by this telegram:

"Boston, Mass., Feby. 21st, 1900.

"Levi Cotton Mills, Rutherfordton, N. C.: May we sell twenty-five to fifty thousand pounds thirties two-ply skein twenty-seven cents deliveries following present orders. Please wire quick answer.

"Catlin & Co."

They resulted in the following letter and accompanying order:

"Boston, Feb. 26th, 1900.

"Levi Cotton Mills, Rutherfordton, N. C.—Dear Sirs: We enclose Order No. 40 for 47,200 pounds No. 30/2, which we have closed in accordance with your telegram, and we are wiring you to this effect to-day.

"This customer would like weekly deliveries to begin earlier than August, and to have the weekly amount run up to 7,000 pounds per week. We told him if we could possibly arrange it, deliveries would begin earlier than August, and also if the amount could be increased this should be done.

"Yours truly,

Catlin & Co. W."

"Sold for account of

Boston, Feb. 26, 1900.

"Levi Cotton Mills,

"Order No. 40.

"47,200 lbs. 30/2 skein

"54 inch reel—2 1/2 oz. skeins 18 turns

Same as Order No. 10

"27 c. 2% 10th fol. mo.

"Deliveries 4,000 lb. weekly Aug. 1.

"Have deliveries begin before Aug. 1 if possible, and deliveries to run 7,000 lb. wky if it can be arranged.

"Ship to Catlin & Co., Pascoag, R. I.

"Frt. Paid.

Catlin & Co."

The amount was afterwards changed from 47,200 pounds to 50,000, and the plaintiff procured cotton for manufacturing the yarn. On July 5th before time to commence on it for delivery according to the order, the defendants wrote to the plaintiff, "Regarding order No. 40. * * * Please do not start on this until we advise you"—and again on July 11, wrote the same.

The plaintiff wrote to the defendants:

"Rutherfordton, September 8, 1900.

"Messrs. Catlin & Co., Gentlemen: * * * How is customer's pulse on 40 order, on which you asked us to hold up until further notice? * * *

"Yours Respy.,

Levi Cotton Mills Co.,

"per M. Levi, Pres't."

The defendants answered:

"Boston, September 11, 1900.

"Levi Cotton Mills—Dear Sirs: * * * Our customer order No. 40 has advised us he will not receive any more yarn on that contract on account of the quality of yarn which we have been delivering him. * * *

"Yours,

Catlin & Co."

The plaintiff wrote and sent:

"December 31, 1900.

"Messrs. Catlin & Co., New York City—Gentlemen: We hereby request the name of Customer who purchased order No. 40. Please reply promptly. * * *

Levi Cotton Mills,

"per M. Levi, Pres."

To this no answer was received.

Because of the defendants' directions, the plaintiff did not manufacture the goods. Damages for the loss of the order were proved to the amount of the verdict directed. The defendants offered no evidence.

Upon this motion the defendants contend that no contract for the goods binding the defendants was made out, and that no breach of it is shown, if there was. The contention of the defendants as to liability is, in substance, that nothing but agency of the defendants for the plaintiff in the transaction complained of is shown. The plaintiff insists that they became principals. A commission merchant is, in terms, more than a mere agent of one party in making sales, but acts between both in conducting the business. *Slack v. Tucker*, 23 Wall. 321, 23 L. Ed. 143. In making order 40, in question, the defendants, by the words "sold for account of Levi Cotton Mills," assumed that there was a sale of goods described, upon the terms named, from the plaintiff to some purchaser. If there was no other purchaser, they would stand in the place of one, and be holden, as such, to make good their assumption. The order, when accepted, bound the plaintiff to furnish the goods, and the defendants to take them, for the purchaser they represented they had, or for themselves. If they had one, they were bound to produce him; if not, to stand in his place. They not only did not produce, but withheld knowledge of, such other principal, if there was one, and thus took, or left themselves in, the place of a purchaser, like agents for an undisclosed principal. Story on Agency, § 267. The order is signed by the defendants in their own names, as parties to be charged thereby, within the statute of frauds. Their liability is that of the one giving the order which they desired to have filled, and which by acceptance became a contract of the plaintiff to make, and of the defendants to take, the goods according to the terms of the order.

There was considerable correspondence about this order besides that quoted, but at no time did the defendants revoke the direct requests of July 5th and July 11th not to start on the order until they should advise; and matters so remained till the peremptory information on September 11th that no more would be received on that order. After these directions, the plaintiff would not seem to have been warranted in proceeding with the manufacture of the goods at the expense of the defendants; nor would waiting for their advices accordingly, under the circumstances, be an abandonment or waiver of their rights under the contract. The defendants had a right to stop the manufacture and take the consequences. This is what they appear to have preferred. The liability for damages for the breach followed.

Motion overruled.

63 C.C.A.—22

(128 Fed. 870.)

COX v. DURHAM et al.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1904.)

No. 1,960.

1. FALSE IMPRISONMENT—SUFFICIENCY OF WARRANT TO PROTECT OFFICER—QUESTION FOR COURT.

Whether a warrant of arrest sufficiently describes the person arrested thereon to afford protection to the officer making the arrest against an action for false imprisonment is a question for the court, where the facts are undisputed.

2. SAME—DESCRIPTION OF PERSON.

A person's middle name is not recognized in law, and the omission of the initial letter of such name in a warrant of arrest, or a mistake therein, is immaterial.

3. SAME—USING INITIAL OF FIRST NAME.

It is sufficient to describe a person in a warrant by giving the initial letter of his first name instead of writing such name in full, especially where he ordinarily uses and is known by the initial.

4. SAME.

A warrant commanding the arrest of J. I. Cox, and reciting the filing of a complaint charging said Cox, "late of the county of Boulder and state of Colorado," with having committed a crime in such county, and being a fugitive from justice, protects the officer in the arrest thereon of James T. Cox, commonly known as J. T. Cox, where he was the person in fact intended, although he was not late of said county nor a fugitive from justice, the description being sufficient, and those being matters to be determined on his trial, and not by the officer.

In Error to the Circuit Court of the United States for the Western District of Missouri.

James M. Houston, for plaintiff in error.

A. S. Van Valkenburgh (William Warner and Robert F. Porter with him on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge. James T. Cox, the plaintiff in error, brought this action against Edwin R. Durham, the United States marshal for the Western District of Missouri, John E. Morrison, and the American Surety Company of New York, who are the defendants in error. The complaint contained two counts, in one of which damages were claimed apparently on account of the abuse or misuse of process, and in the other damages were claimed as for a false imprisonment. The surety company was the surety on the official bond of the marshal, while the other defendant, Morrison, appears to have been one of the marshal's deputies who made the arrest hereinafter described. The facts which gave rise to the controversy appear to be these: In April, 1899, a post office at Boulder, Colo., was broken into and robbed. The robber was at first unknown, but afterwards a man who went by the name of George Rogers was arrested at Lincoln, Neb., for some offense against the postal laws, and while on the way to jail threw away some papers and checks which were supposed to have some bearing or throw some light on the robbery previously committed at Boulder. Among the papers so thrown away, but subsequently recovered,

was an express money order receipt which indicated that the money order was purchased by J. T. Cox and was payable to J. J. Cox at a place named Belton. A post office inspector by the name of Waters, who was engaged in investigating the robbery at Boulder, Colo., when this receipt came into his hands and certain inquiries had been made with reference thereto of persons who were acquainted with Rogers, was led to conclude that the real name of the man Rogers, who threw the receipt away, was J. T. Cox, and that he had in fact committed the robbery at Boulder. For the purposes of the present case it is unnecessary to state more in detail the reasons which led him to this conclusion. As the name of the state where Belton was located was not stated on the face of the receipt, the inspector proceeded to ascertain its location. He found that there were only four post offices named Belton in the United States, one of which was located in Texas, one in Oklahoma territory, one in South Carolina, and one in Missouri. He thereupon addressed an inquiry to the postmasters at three of these places to ascertain if any person by the name of J. T. Cox was known or was living in the vicinity. He received a letter from the postmaster at Belton, Mo., under date of January 11, 1900, informing him that a man by the name of J. T. Cox was living in that vicinity. Acting on the belief that the person residing near Belton, Mo., by the name of J. T. Cox, was the person for whom he was in search, and believing, apparently, that the evidence in his possession tended to show that he had committed the robbery at Boulder, he proceeded to Kansas City, Mo., near which city Belton, Mo., is located, and laid the facts and his suspicions before the United States attorney for the Western District of Missouri. Thereupon one of the assistants of that officer filed an information under oath before a United States commissioner, charging, on information and belief, that on or about April 11, 1899, at the county of Boulder and state of Colorado, "one J. I. Cox, alias George Rogers, * * * did unlawfully and feloniously break into a certain building then and there used * * * as a post office of the United States with intent therein to commit larceny and other depredations, and the property of the United States to steal, take, and carry away; and that the said J. I. Cox, alias George Rogers, is now a fugitive from justice within the Western District of Missouri." On the filing of such information the commissioner issued a warrant commanding the United States marshal for the Western District of Missouri and his deputies, or any or either of them, in the name of the President of the United States, "to apprehend the said J. I. Cox, alias George Rogers, wherever found in your district, and bring his body forthwith before me or any other commissioner having jurisdiction of said matter, to answer the said complaint, that he may then and there be dealt with according to law for the said offense." The warrant contained the usual recital that a complaint in writing under oath had been made before the commissioner, "charging that J. I. Cox, alias George Rogers, late of Boulder county, in the state of Colorado, on or about the 11th day of April, A. D. 1899, did at the county of Boulder, in violation of section 5478 of the Revised Statutes of the United States, unlawfully and feloniously break into a building then and there used * * * as a post office of the United States, with intent there-

in to commit larceny and other depredations." This warrant was placed by the marshal in the hands of one of his deputies, the defendant, John E. Morrison, who proceeded to Belton, Mo., to make the arrest. The arrest was made a little after daylight on the morning of January 16, 1900, and handcuffs were placed on the prisoner at the time of the arrest, although the plaintiff protested that if the marshal desired to take him to any place he would go peaceably without being handcuffed. While being taken by train from Belton to Kansas City, Mo., the warrant was read to the prisoner, and when so read to him he advised the officer that his name was J. T. Cox, and not J. I. Cox, as specified in the warrant, and that for this reason he was not properly described. After the plaintiff was taken to Kansas City, Mo., he was brought before the commissioner, and advised the commissioner that his true name was J. T. Cox, and not J. I. Cox, whereupon, as the plaintiff testified, the commissioner changed the letter I to a T, saying that the "I" was meant for a "T." He was committed to jail under the description James T. Cox, alias George Rogers, and was vaccinated pursuant to jail regulations. Several hours after he had been committed to jail, but on the same day, the plaintiff was discharged and left for home that evening, it having been discovered in the meantime by the post office inspector that he was not the man who had committed the robbery at Boulder, Colo., and that the suspicions previously entertained to that effect were erroneous.

At the conclusion of the trial, the trial court instructed the jury, in substance, as a matter of law; that there could be no recovery against the marshal as for a false imprisonment; that the warrant was sufficient to protect the officer from an action of that character. The trial court, however, allowed the jury to determine whether in executing the process the marshal's deputy had been guilty of any harsh or unnecessary ill treatment of the prisoner amounting to an abuse of process, and permitted them to assess such damages as they deemed reasonable if they so found. Under these instructions the jury returned a verdict in favor of the defendants, on which a judgment was subsequently entered, and the case is before this court for review.

Counsel for the plaintiff in error say, in substance, that the principal errors complained of consist in the action of the trial court in declaring, as a matter of law, that the plaintiff was sufficiently described in the warrant of arrest; that the warrant protected the officer in making the arrest, so that he could not be held liable as for a false imprisonment, and in refusing to submit these questions to the jury, by whom, as counsel for the plaintiff urges, the sufficiency of the warrant as a justification should have been determined. We fail to perceive that it was within the legitimate province of the jury to determine whether the warrant contained an adequate description of the plaintiff and was sufficient to protect the marshal in an action for false imprisonment. There was no controversy with reference to the facts in the light of which this question ought to be determined. The plaintiff's real name was confessedly James T. Cox, while the warrant commanded the arrest of J. I. Cox. The plaintiff resided near Belton, Mo., and it is manifest from the testimony that he was the man whom the postmaster had reported as living near that place, and whom the post

office inspector had in mind when he laid the matter before the United States attorney and sued out the warrant, so that the very person was arrested for whom the warrant was intended. It is true that the inspector supposed, when he sued out the warrant, that the plaintiff was the man who had committed the robbery at Boulder, Colo., and for that reason the warrant recited that he was "late of Boulder county, in the state of Colorado," but it commanded the arrest of "J. I. Cox, alias George Rogers, wherever found in your district"; and, to justify his act in making the arrest, the marshal was neither bound to prove that the plaintiff was late of Boulder county, Colo., or that he had actually committed the robbery, these being matters to be determined by a petit jury. The question to be decided, so far as the marshal is concerned, is whether, under a writ commanding the arrest of J. I. Cox, he had the right to arrest James T. Cox, it being shown beyond peradventure that the person who was taken into custody was the one for whom the warrant was intended. This, we think, was a question of law which the court, and not the jury, was required to determine.

It is claimed that the warrant in question did not "particularly describe" the plaintiff within the meaning of those words as used in the fourth amendment to the Constitution of the United States, and that for this reason it afforded no protection to the officer who served it. It is not expressly contended, as we understand, that the plaintiff was not particularly described because his full given name "James" was not written in the warrant. Such a contention, if made, could not be upheld, because the modern doctrine is that a man may be sufficiently described by the initial letter of his given name, as well as by the name in full, and this is so especially where a man is commonly designated by the initial letter of his given name, and where he answers to that name and makes a practice of writing his name in that way in ordinary business transactions. *Ferguson v. Smith*, 10 Kan. 398, 402; *State of Iowa v. Van Auken*, 98 Iowa, 674, 677, 68 N. W. 454; *Oakley v. Pegler*, 30 Neb. 628, 632, 46 N. W. 920; *Casey v. People*, 159 Ill. 267, 42 N. E. 882. See, also, *Breedlove v. Nicolet*, 7 Pet. 413, 430, 8 L. Ed. 731; *United States v. Janes* (D. C.) 74 Fed. 543. The record before us contains abundant evidence that the plaintiff usually went by the name and was often referred to as J. T. Cox. He stated on his cross-examination that his name was J. T. Cox, and that letters intended for him were thus addressed and received, and that he had letters in his possession which were thus addressed. We are of opinion, therefore, that a warrant describing him in that manner would be a sufficient protection for the officer who executed it. We can conceive of no reason why a man who responds, when addressed, to the name of J. T. Cox, and is so called by his acquaintances, should challenge the validity of a warrant which thus describes him.

The principal objection to the warrant appears to be that the initials of the plaintiff's name as set forth in the warrant were J. I. instead of J. T., his true initials; but this objection is answered and overcome by the rule that the law knows or recognizes but one given name, and that the omission of the initial letter of the middle given name, or a mistake made in the initial letter of that name, is not regarded as material. This doctrine is announced in a large number of cases, and

seems to be well settled. Thus, in *Games v. Dunn*, 14 Pet. 322, 327, 10 L. Ed. 476, the court observed: "The law knows of but one Christian name, and the omission or insertion of the middle name or of the initial letter of that name is immaterial." In the case of *People v. Lockwood*, 6 Cal. 205, an indictment for murder charged the killing of one J. P. Beatty, while the evidence showed that the name of the deceased was J. T. Beatty. The court held that the misnomer in question was not material, the middle name not being regarded in law as a part of the name of the deceased. See, also, *Franklin v. Talmadge*, 5 Johns. 84; *English v. State*, 30 Tex. App. 470, 18 S. W. 94; *Delphino v. State*, 11 Tex. App. 30; *Orme v. Shephard*, 7 Mo. 606. The rule that one's middle name is not recognized in law does not apply to a mistake made in the initial letter of the first Christian name. It seems that a mistake made in the initial letter of the first Christian name in a criminal proceeding amounts to a material variance, but not so if the mistake is in the initial letter of the middle name. *English v. State*, supra.

In the case of *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643, upon which counsel for the plaintiff in error seems to place his chief reliance, a warrant was issued for the arrest of James West, without other description, under which the officer arrested Vandy M. West, who, as the evidence showed, was never known or called by any other name. It was held that such a warrant afforded no protection to the officer, in that it contained no description of the party to be arrested, and that because it contained no such description it was incompetent to show, in an action for false imprisonment, that Vandy M. West, a person not described, was in fact the person for whom the warrant was intended. The case at bar, in our judgment, is essentially a different case. The warrant did contain a description of the plaintiff, in that it gave his family name and the true initial letter of his first Christian name, this being the initial which he commonly used and by which he was generally known and addressed. Now, as the law recognizes but one Christian name, treating the middle name as immaterial, the description contained in the warrant was sufficient to identify the plaintiff, and a description of that kind must be regarded as sufficient to satisfy the mandate of the Constitution that a warrant shall particularly describe the party to be arrested. At all events, a description which is sufficient to enable the officer to identify the arrested party should serve to protect the officer, especially when it appears that it was served on the party for whom it was intended.

The judgment below is accordingly affirmed.

(128 Fed. 875.)

OIL WELL SUPPLY CO. v. HALL et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

No. 504.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—DISCRETION TO SUBMIT ISSUES TO JURY.

Issue having been joined in a petition in involuntary bankruptcy against a partnership, and a jury trial waived, defendants subsequently filed an amended answer admitting insolvency, but not admitting the commission of the acts of bankruptcy charged, and praying that they be adjudged bankrupts on certain conditions. The district judge refused to act upon such answer, and certified the cause to the Circuit Court, which permitted the withdrawal of the amended answer, and submitted the issue joined by the original answer to the jury, which returned a verdict for defendants. The result having been reported back to the District Court, the judge therein adopted the verdict and dismissed the petition. *Held*, that the action taken was not under section 19 of the Bankruptcy Act, (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), but was within the discretion of the court—the verdict being taken as advisory, merely—and that, where it appeared that the matter was fairly tried upon its merits, the order of dismissal would not be reversed on appeal because of informality in the procedure.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Clarksburg, in Bankruptcy.

This case comes up on appeal from the District Court of the United States for the Northern District of West Virginia, sitting in bankruptcy. The Oil Well Supply Company and the Jarecki Manufacturing Company, corporations of Pennsylvania, with the National Supply Company, a corporation of West Virginia, filed in the District Court their petition in bankruptcy against James F. Hall and Curtis I. Hall, copartners as Hall Bros., charging them as being insolvent, and, within four months next preceding the date of the petition, with having committed an act of bankruptcy, to wit, concealing and removing, and permitting to be concealed and removed, part of their property, with intent to hinder, delay, and defraud their creditors. Upon consideration of the petition, his honor Judge Jackson, District Judge, issued his rule calling upon the alleged bankrupts to show cause before him at Parkersburg, W. Va., on 16th June, 1902, why the prayer of the petition be not granted. The respondents appeared, and filed a paper which contains a notice to dismiss the petition for want of lawful process, and a demurrer, a plea, and an answer. The plea is that the petitioners have no provable debts against them. The demurrer and the answer set up the same or similar defenses, as follows: "First, no valid or legal process has been issued upon the petition or served upon the defendants; second, the petition does not allege an act of bankruptcy on the part of the defendants, or either of them, within four months next preceding the filing of the same; third, the petition does not allege that the petitioners are, and each and every one of them, without lien or preference for their claim against the said defendants; fourth, the petition does not set forth any provable debt on the part of any or all of the said petitioners against the said defendants; fifth, the petition does not properly allege the insolvency of the said defendants; sixth, the petition does not allege any fact from which the court may draw the legal inference that the defendants have, within four months next preceding the filing of the said petition, committed any act of bankruptcy. The defendants pray judgment of the court whether they should further defend this proceeding, and that they may be hence dismissed, with their costs in this behalf expended. That no valid or legal process has been issued or served upon the defendants. That the petition does not allege any act of bankruptcy on the part of the defendants, or either of them, within four months next preceding the filing of the same. That the petition does not allege that the petitioners are each and

every one of them without lien or preference for their claims against the said defendants. That the petitioners are not each of them without lien or preference for their claim against the said defendants. That the petition does not set forth any provable debt due to either or all the said petitioners by the said defendants. That the petition does not properly allege the insolvency of the said defendants. That the petition does not allege any facts from which the court may draw the legal inference that the defendants, within four months next preceding the filing of the said petition did, both or either of them, commit an act of bankruptcy. The defendants deny that they, or either of them, have committed the act of bankruptcy set forth in said petition, or that they are insolvent, and aver that they should not be adjudged bankrupts for any cause set forth in said petition, and this they pray may be inquired of by the court."

The questions thus made came before the District Court. The motion to dismiss the petition was refused, but the demurrer was sustained, and leave was given to the petitioning creditors to amend their petition. Leave was given to file the plea and answer, subject to the right to file the demurrer. The order closed with these words, "The right of trial by jury is waived by said alleged bankrupts," and the cause was continued. The creditors amended their petition pursuant to the leave granted. Thereupon the respondents demurred to it on several grounds. The demurrer came on to be heard on 23d August, 1902, and was overruled on all points but one, and that was allegation of new matter. Respondents then asked leave to amend their answer theretofore filed. This was allowed, and the following reference ordered: "And all questions and matters properly arising under the pleadings herein are referred to George W. Johnston, one of the referees of said cause in bankruptcy, for the purpose of taking such testimony as the petitioners herein may adduce in support of the issues raised by the pleadings herein, and such testimony, also, as may be adduced by the alleged bankrupts in opposition thereto, and to report his findings herein to this court, along with the testimony taken hereunder, as soon as practicable; but, before the said referee shall proceed to execute this reference, he shall give ten days' notice to all parties of record, or their attorneys, of the time and place of such hearing."

The parties went before the referee. Thereupon respondents filed their amended answer, in the words following: "The alleged bankrupts, the firm of Hall Bros., composed of James F. Hall and C. I. Hall, trading as such firm, and James F. Hall and Curtis I. Hall, each of them individually, desire to amend their answer heretofore filed in this cause, and for amended answer, say, first, that they as a firm, and they—each of them—individually, are unable to pay and discharge the debts now owing by the said firm, and by them and each of them individually, and are willing to be adjudged bankrupts; second, that their inability to pay their said debts results from the fact that they were prevented from the completion of certain contracts under which they were operating, and certain other contracts under which they were about to begin operations, by the institution of certain suits and the issuance and levy of certain attachments in the circuit court of Tyler county, West Virginia, on or about the 7th day of March, 1902. Therefore the said firm of Hall Bros., James F. Hall and Curtis I. Hall, and each of them individually, pray this honorable court that they, as such firm, and each of them as individuals, may be by this court adjudged bankrupts, and discharged from the payment of all debts properly dischargeable in bankruptcy; that the order adjudging such bankruptcy shall give the respondents a period of ten days in which to prepare and file a statement of their joint and several properties, assets, debts, and liabilities; that by the said order a trustee be appointed to take charge of and administer their joint and several estates according to law; that said order shall further show that the order heretofore issued by this honorable court in this cause staying the attachment proceedings and other proceedings in the circuit court of Tyler county, West Virginia, be, and shall be thereby, dissolved, and that the trustees so appointed be authorized and directed to defend the said attachment proceedings, and to move the said court to quash and vacate all attachments issued and executed upon the property of the respondents, to the end that there may be perfected in the said trustee a right of action, full and complete, for damages for the unlaw-

ful detention of the property so attached for the benefit of the estate of the respondent bankrupts; that the order dissolving the said staying order shall likewise authorize the said James F. Hall, in his own name and for his own benefit, to proceed with his defense to an order of arrest issued and executed against him in connection with one of the causes pending in the circuit court of Tyler county, West Virginia, to which the said staying order was addressed. And your respondents will ever pray."

The referee marked this amended answer "Filed," to be read as part of the testimony in the case. The referee reported all this to the court, adding: "And the petitioners, by their counsel, not desiring at this time to take any testimony in the matter, submit the questions raised on the answer to the court, and the parties, by their counsel, agreeing that the matters arising on the answer shall be heard before the Honorable John J. Jackson, judge of said court, at Parkersburg, on the 30th September, 1902, at 11:30 o'clock a. m." The cause came up before the judge, and, by an order made as in the District Court, he says: "This cause came on this 30th September, 1902, to be heard upon the papers heretofore read, and the decrees heretofore entered, and upon the answer filed by the bankrupts, in which they admit they are bankrupts, but upon conditions stated in the answer that this court is of opinion should not be attached to any admission of that character, not at this time to adjudicate them bankrupts, but to continue the motion to the plaintiff to have the defendants adjudicated bankrupts until the next term of this court, sitting in Parkersburg, in January next, at which time the case can be submitted to a jury to determine whether or not they should be adjudicated bankrupts." The order then names a trustee, and makes some other provisions not bearing on the issues before us. There is no District Court at Parkersburg. This order of 30th September is explained by an order taken in the Circuit Court on 22d January, 1903, as follows: "This day came the parties, by their attorneys, and it appearing that, heretofore, to wit, on 30th September, 1902, the judge of the United States District Court for the Northern District of West Virginia made an order directing that the fact of the commission by Hall Bros. of an act of bankruptcy, and the fact of their insolvency, be certified to the Circuit Court of the United States for the Northern District of West Virginia for trial before a jury, it is ordered that this cause be docketed in the Circuit Court of the United States for the Northern District of West Virginia for further proceedings to be had therein." The hearing was fixed for 17th March next thereafter, and on that day in the Circuit Court this order was entered: "This cause came on this day to be heard pursuant to the order entered herein on the 30th day of September, 1902, directing that this cause be referred to a jury of the court to determine whether or not the alleged bankrupts had been guilty of acts of bankruptcy as in the petition alleged, whereupon the alleged bankrupts, by counsel, moved the court for leave to withdraw their amended answer, and to permit their answer to the original petition to be filed and considered as an answer to the amended petition, to which motion the petitioning creditors, by counsel, objected, which objection was overruled, and leave was given by the court, and said answer is ordered to be filed and considered accordingly."

This case was then tried before a jury, and verdict had for respondents. A motion was made for a new trial, which was refused in the Circuit Court. The result of the trial of the case in the Circuit Court having been reported to the District Court, a decree was entered adjudging that the petition of the petitioning creditors be dismissed, with costs, but allowing an appeal to this court. It is here on assignments of error as follows: "First, the court erred in falling and refusing to adjudge the said Hall Bros. bankrupts upon the petition of your petitioners; second, the court erred in dismissing the petition wherein petitioners pray that said Hall Bros. be adjudged bankrupts; third, the said court erred in directing the trial by jury in said proceeding as to whether the said Hall Bros. were guilty of the acts of bankruptcy charged by your petitioners in their petition; fourth, the court erred in refusing to set aside the verdict of the jury upon said trial, which found said defendants Hall Bros. not guilty of the acts of bankruptcy charged against them as aforesaid; fifth, the said court erred in not setting aside the said verdict

because the said trial had been improperly and illegally directed in said proceeding; sixth, the court erred in failing to adjudge the said Hall Bros. bankrupts upon their final answer in said cause."

C. D. Merrick, for appellants.

Waller R. Staples, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and McDOWELL, District Judge.

SIMONTON, Circuit Judge (after stating the facts as above). It is very clear that the case below was not submitted to the jury under the provisions of the nineteenth section of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]). The respondents did not demand a jury. Indeed, the record states that a jury was waived. But the District Judge, of his own motion, and for his own satisfaction, desired the aid of a jury in passing upon the question whether an act of bankruptcy had been committed, as charged in the petition. It is always within the discretion of a judge to seek the aid of a jury in solving a question of fact. In the court of chancery the chancellor can do this, either by ordering an issue out of chancery to be tried in the law court, or by impaneling a jury himself in his own court, and submitting the question to them himself. *Wilson v. Riddle*, 123 U. S. 615, 8 Sup. Ct. 255, 31 L. Ed. 280; *Idaho, etc., Co. v. Bradley*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433. In all such cases the verdict of the jury is advisory—not binding on the court, which must for itself determine the issues. This was the course pursued here. The judge presented the issue to the jury, but he afterwards adopted their conclusion, and gave effect to it by his own decree. This he need not have done if the jury trial had been had under the nineteenth section of the bankruptcy act. In carrying out his purpose to seek the aid of a jury, he used a jury in the court over which he was about to preside, and which best suited his convenience—the jury in the Circuit Court at Parkersburg. As the verdict of the jury was sought by himself to aid his conclusion, he could select any jury, especially as the jurors in the District and Circuit Courts of the United States can be used in either court.

As the jury was called by himself to his aid, it would seem that he had the right to formulate the issue upon which he desired them to pass. Therefore, when he chose the issue presented in the original answer, and withdrew the issue presented in the amended answer, he was within his discretion. Especially was this the case when the amended answer was unsatisfactory to him, because it did not admit any act of bankruptcy antecedent to the filing of the petition and annexed conditions which he would not allow. Beside this, if he had used the amended answer in determining the issue, there would have been no controversy; this amended answer admitting the affirmative of the issue. The petitioning creditors were not surprised at this action of the judge, nor were they taken at a disadvantage. They did not move for a continuance on either of these grounds, but they presented their witnesses, went to trial, and the witnesses were all examined. Exceptions were taken during the

course of the trial, which were afterwards argued. The cause had all the formalities and safeguards of regular trial. When it was ended, a motion for a new trial was entered. The judge then took the matter under advisement, and made his own judgment. It would seem that full examination was made, and substantial justice was effected. The petitioners had every opportunity of making out their case. Its merits were passed upon by the court after he had had the aid of the jury. *Lancaster v. Collins*, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373; *Deery v. Cray*, 5 Wall. 575, 18 L. Ed. 653. In *Allis v. Insurance Co.*, 97 U. S. 144, 24 L. Ed. 1008, the court says, "When it can be seen that no harm resulted to appellant, this court will not reverse a decree on account of an immaterial departure from technical rules of proceeding." It is true that there were informalities—perhaps it should be said disregard of forms—but they do not appear to us to be reversible errors.

The judgment of the court below is affirmed.

(128 Fed. 879.)

THE KAWAILANI.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1904.)

No. 932.

1. FEDERAL COURTS—APPEAL—FILING TRANSCRIPT—TIME—MOTION TO DISMISS.

Where a transcript of the record is filed in the Circuit Court of Appeals after the time prescribed by the rules has expired, but before a motion is made to dismiss the appeal on that ground, such motion will not be granted.

2. REVENUE LAWS—INTOXICATING LIQUORS—FRAUDULENT CONCEALMENT—VESSELS—CONDEMNATION—TRIAL—ACTS OF JUDGE.

Where, in a proceeding to condemn a vessel for violating the United States revenue laws, in removing and concealing certain intoxicating liquors with intent to escape payment of revenue taxation, at the conclusion of the evidence the question of the identity of the liquor was in doubt, it was proper for the court, on its own motion, to recall an internal revenue collector who had testified, and question him further on such issue.

3. SAME—INTOXICATING LIQUORS—COMMON KNOWLEDGE.

Where, in a proceeding for the forfeiture of a vessel for violating internal revenue laws, in transporting and secreting certain *okolihoa*, there was no controversy that the liquor transported and secreted was the product of the *ti* root, grown in Hawaii, which the Supreme Court of such republic had previously held was a "well-known spirituous liquor, of great strength, and very intoxicating," it was not necessary that proof of the intoxicating qualities of such liquor should be introduced.

4. SAME—MANUFACTURE—TIME.

In a proceeding for the forfeiture of a vessel for violating the internal revenue laws, in transporting and concealing intoxicating liquors, evidence held to justify a finding that the liquor concealed was manufactured in Hawaii subsequent to the taking effect in that territory of the revenue laws of the United States.

Appeal from the District Court of the United States for the District of Hawaii.

Wm. Daingerfield (Clarence W. Ashford, of counsel), for appellant. Marshall B. Woodworth, U. S. Atty. for Northern District of California, and Robert W. Breckons, U. S. Atty. for District of Hawaii.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. A motion is made in this cause to dismiss the appeal. It is not contended that the appeal was not duly perfected, but that the record was not filed in this court within the time prescribed by its rules. The appeal was perfected July 18, 1902, and the record was not filed here until January 5, 1903; but it was filed before any motion was made to dismiss, the latter not having been made until June 9, 1903. As said by the Circuit Court of Appeals for the Sixth Circuit in *Altenberg et al. v. Grant et al.*, 83 Fed. 980, 981, 28 C. C. A. 244: "*Bingham v. Morris*, 7 Cranch, 99 [3 L. Ed. 281], shows that, if the transcript of record is filed before the motion for dismissal, the motion will not be granted." The motion to dismiss is denied.

The appeal is from a decree of the District Court for the District of Hawaii condemning and forfeiting to the United States the schooner *Kawailani*, her tackle, apparel, and furniture. The grounds for the seizure, condemnation, and forfeiture stated in the libel of information are, in short, that at and prior to the time of seizure one G. K. Kehahune, then and there being in charge of the vessel in the port of Honolulu, did use the same in the removal of certain spirituous liquors upon which a tax was imposed by the laws of the United States, which tax had not been paid, with the intent then and there to defraud the United States of the tax, and at the same time and place did deposit and conceal on the schooner certain spirituous liquors upon which a tax was imposed by the laws of the United States, which tax had not been paid, with the intent then and there to defraud the United States thereof, in the depositing and concealing of which liquors the said vessel was used by the said Kehahune. Two claimants appeared and answered—Hong Quon and L. Apana—setting up ownership of the schooner, and putting in issue the averments of the libel. After a trial of the issues, the court found the facts in favor of the government, and decreed a forfeiture of the property.

In their argument, the appellant's counsel confined themselves to the second, third, fourth, fifth, and sixth assignments of errors, which are as follows:

"Second. The United States having rested its case, and said appellants having put on testimony and rested, and no testimony being offered in rebuttal, appellants, by their counsel, moved to strike out all the evidence given by said A. L. Webster, and all tests of said liquor made in court, for the reason that there was no testimony before the court to identify the liquor so tested by said witness, as the liquor mentioned in the libel herein. Third. That the court erred in finding as a fact, and in presuming, as set forth in its said decision, that the liquor produced in court upon said hearing and trial was distilled liquor manufactured in the territory of Hawaii. Fourth. That the said court erred in finding, as a matter of fact, that said last-described liquor was produced or manufactured in the United States. Fifth. That the court erred in finding, as a matter of act, that the liquor so produced in court, or the liquor mentioned in said libel of information, was produced in the terri-

tory of Hawaii since the extension to the islands which now constitute said territory became subject to the internal revenue laws of the United States. Sixth. That the court erred in finding, as matter of law, that the liquor mentioned in said libel of information, or the liquor so produced in court, or any thereof, was or is liable or subject to any tax under the laws of the United States."

It is insisted on the part of the appellant that it was essential to the government's case for the proof to show that the liquor in question was distilled in Hawaii subsequent to the taking effect in that territory of the internal revenue laws of the United States, to wit, June 14, 1900, the date of the taking effect of its organic act of April 30th of the same year (chapter 339; 31 Stat. 141); that the court below based its findings of fact to that effect upon mere presumptions, and without any proof of those facts. It is also insisted that the character of the liquor found by the government's officers concealed on board the schooner in question by its captain was not such as to bring it within the provisions of the revenue laws, and that the liquor found concealed on the vessel was not properly identified as that introduced in evidence on the trial of the case. In connection with the latter point, complaint is made that, upon the conclusion of the testimony, the court below, of its own motion, recalled the internal revenue collector, Roy H. Chamberlain, and questioned him further in respect to the identity of the liquor offered in evidence with that found by him on the vessel. To that action of the court below the appellant reserved an exception, and here insists upon it. There is no merit in it. The recalling of the witness was clearly within the discretion of the court, and was highly proper, if the evidence already given left the question of the identity of the liquor in doubt, and the witness could make the matter clear. This he did by his testimony.

In respect to the nature of the liquor in question, it appeared without conflict in the evidence that it is the product of the ti root grown in the Hawaiian Islands, and known as "okolihoa," and so well known there that the Supreme Court of the Republic of Hawaii, in deciding the case of a defendant convicted of the offense of distilling spirituous liquor without a license, in violation of a certain section of the Session Laws of the Republic of 1892, spoke of it as "a well-known spirituous liquor, of great strength, and very intoxicating." Rep. Ha. v. Akoni, 11 Hawaii, 53. In that case the liquor itself was produced before the jury for examination, just as the liquor in question here was produced before the court, and examined by the witnesses, one at least of whom testified that it was okolihoa. In *Commonwealth v. Peckham*, 2 Gray, 514, the court held that an allegation, in an indictment, of an unlawful sale of intoxicating liquor, is supported by proof of a sale of gin, without proof that gin is intoxicating, saying:

"Jurors are not presumed to be ignorant of what everybody else knows, and they are allowed to act upon matters within their general knowledge without any testimony on those matters. Now, everybody who knows what gin is knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor, without evidence that it was not a solid substance, as that they could not find that it was intoxicating, without testimony to show it to be so. No juror can be supposed to be so ignorant as not to know what gin is. Proof,

therefore, that the defendant sold gin, is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin."

Was the evidence sufficient to justify the conclusion of the court to the effect that the liquor concealed by the captain of the schooner on board of her was manufactured in Hawaii subsequent to the taking effect in that Territory of the revenue laws of the United States? In this connection it must be remembered that circumstantial evidence is sometimes quite as strong as direct. If the liquor in question had not been subject to the tax imposed by the revenue laws of the country, there could have been no motive on the part of the captain of the schooner in concealing it on board, and in denying to the revenue officers, as he repeatedly did, that he had it. It was only after the officers had commenced a search of the vessel under their warrant, and had been prosecuting their search for some time, that the captain produced the liquor. And how did he get it? It appears from the testimony that one Peter Makia lived at Kahana, in the northern part of the Island of Oahu, and that it was to his house, at the request of the captain of the schooner, that the liquor was brought, and from which he took it on board the vessel. Makia's testimony is to the effect that he had lived at Kahana about a year and eight months; that up in the mountains, but a short distance from his house, a Japanese was engaged in making okolihoa; that within a few months of the time the witness was testifying he had seen a part of the plant with which the Japanese manufactured the liquor; and that it was to this place that the witness sent, at the request of the captain of the schooner, for the liquor that the captain afterwards concealed upon the vessel, and upon which it was shown no tax was ever paid to the government. We think these facts and circumstances, and others of a like nature, sufficient to justify the conclusions of the court below.

The judgment is affirmed.

(129 Fed. 192.)

BROUGHT et al. v. CHEROKEE NATION.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1904.)

No. 1,867.

1. INDIANS—SUIT TO DISPOSSESS INTRUDER ON LANDS OF TRIBE—PARTIES.

A suit under Act June 28, 1898 (30 Stat. 495, c. 517), to dispossess an intruder on lands owned by an Indian tribe or nation, although brought by a member of the tribe, as permitted by such act, when the tribe fails or refuses to bring it, is based primarily on the right of the tribe, and the court may properly permit it to be substituted as plaintiff, and to allow the name of the original plaintiff to be stricken out, with his consent.

2. SAME—PLEADING—VERIFICATION OF COMPLAINT.

It is sufficient compliance with the requirement of such act that a "sworn complaint" shall be filed if the complaint is verified by the authorized

attorney of the tribe or nation which is plaintiff, who states that the facts alleged are within his knowledge.

3. JUDGMENT—CONFORMITY TO PLEADINGS—EXCESSIVE DAMAGES.

A judgment for damages in a sum greater than is alleged or prayed for in the complaint cannot be sustained, although it may be supported by the evidence.

4. INDIANS—SUIT TO DISPOSSESS INTRUDER ON LANDS—PLEADING.

Where the defendants in a suit by an Indian tribe to dispossess an intruder on its lands and recover damages for wrongful detention do not plead the value of their improvements, or ask to recover for the same, the court is without authority to set off such value against the damages awarded plaintiff.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 69 S. W. 937.

M. M. Edmiston (W. S. Stanfield, on the brief), for plaintiffs in error.

James S. Davenport, for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge. This is an action which was originally brought in the United States Court in the Indian Territory on May 30, 1899, by Andrew McAffrey against C. G. Brought, Mrs. C. G. Brought, J. H. Balfour, and J. Reamer, three of whom are the present plaintiffs in error, to recover an intruder's improvement, as authorized by the third section of the act of Congress of June 28, 1898 (30 Stat. 495, c. 517). The case is very similar to the case of Hargrove et al. v. The Cherokee Nation, 129 Fed. 186, which has just been decided, and reference is here made to the various provisions of the act of Congress of June 28, 1898, which are set forth in that opinion. After the suit at bar was instituted, leave was obtained to file an amended complaint making the Cherokee Nation a party plaintiff, and such a complaint, making the nation a party, was thereafter filed in the month of November, 1899. The complaint was again amended on February 1, 1901, this latter complaint being the one on which the case was eventually tried. When the complaint was last amended, the name of Andrew McAffrey, the original plaintiff, was stricken out by leave of court, and the case was thereafter prosecuted by the Cherokee Nation as the sole plaintiff. The complaint showed, by proper averments, that the defendants proceeded against were intruders in the Indian Territory, and were holding and occupying land belonging to the Cherokee Nation, on which they had made improvements, which lands were described with sufficient certainty to identify them; that the commission to the Five Tribes had previously reported and decided that the improvements in question were intruder improvements; that the persons who made the same, to wit, C. G. Brought and Mrs. C. G. Brought, had been tendered the money for the value of the improvements, but that they had declined to accept the tender, and had continued to hold and occupy the premises, contrary to the laws of the Cherokee Nation and of the United States; that in conformity with the act of Congress of June 28, 1898, a notice had been served upon the defendants to vacate

the premises, and that more than 30 days had elapsed prior to the bringing of this action since the notice was served; that, notwithstanding such notice, the defendants refused to vacate the premises; that the Cherokee Nation was the owner of the land and the improvements thereon, and had been since the tender of their value to the defendants and their refusal to accept the same; that the plaintiff, the Cherokee Nation, had been made a party to the action by leave of court; and that the annual rental value of the place was \$400 per year, and that the Cherokee Nation had been entitled to the rents and profits of the place since the institution of the action. The Cherokee Nation accordingly prayed judgment for the possession of the lands and the improvements thereon, and for the annual rental value of the same at the rate of \$400 per year until the termination of the action. To the complaint thus filed the defendants interposed a demurrer, but the demurrer was overruled, and, as the defendants elected to stand upon their demurrer, and as both parties waived a jury, the case was submitted to the court, which rendered a judgment in favor of the Cherokee Nation, which judgment is before this court for review on a writ of error. As no bill of exceptions was filed bringing such testimony as may have been heard upon the record in an authentic form, the questions presented to this court for review are those which arise and are presented by the demurrer to the complaint. While the complaint on which the case was tried was demurred to for several reasons, yet we understand that the grounds relied upon to obtain a reversal of the judgment—that is to say, the grounds specified in the brief with which we have been favored—are these: That the Cherokee Nation was erroneously substituted as plaintiff in place of McAffrey; that the name of McAffrey was erroneously stricken out as a party plaintiff; that the amended complaint was not sworn to by the chief or governor of the Cherokee Nation; and that the notice to leave was not served by the nation, but by McAffrey. For all of these reasons, as we understand, the plaintiffs in error insist that the demurrer to the amended complaint should have been sustained, and the action dismissed.

We have already held, however, in *Hargrove et al. v. The Cherokee Nation*, 129 Fed. 186,¹ that when a member of the tribe serves a notice upon an intruder to leave the premises which he wrongfully occupies, and the improvements thereon, and subsequently sues for the recovery of the same, as he is permitted to do by the proviso to section 6 of the act of June 28, 1898 (30 Stat. 497, c. 517), and the nation thereafter elects to join in the action by making itself a party plaintiff, it need not serve a second notice, but may adopt the notice already given by the member of the tribe who originally sued. If the nation does not join of its own volition in an action by one of its citizens to recover an intruder's improvement, it would be the duty of the court, under the second section of the act of June 28, 1898, to issue process against it, and make it a party, as we pointed out in the case of *Hargrove et al. v. The Cherokee Nation*, *supra*. We perceive no sufficient reason, therefore, why its voluntary appearance without process and making itself a party, should not place the nation in the same position which it would have occupied had the court caused it to be made a party; and in the latter event the act expressly declares that "the suit shall thereafter be conducted and

¹ 63 C. C. A. 270.

determined as if said tribe had been an original party to said action." The truth is that suits to recover intruder's improvements are based primarily upon the right of the nation to have and recover such improvements as have been wrongfully erected by an intruder upon its land, and authority is conferred on individual members of a tribe to bring such actions and give the requisite notice because the nation may at times be dilatory in the assertion of its rights. We perceive no error, therefore, in the action of the trial court in permitting the Cherokee Nation to become a party and to proceed with the suit, or in striking out the name of the original plaintiff. At all events, if any one is entitled to complain because the original plaintiff was dropped when the nation became a party, it would seem to be McAffrey himself, and he is not complaining, and has not appealed.

Relative to the contention that the amended complaint was not sworn to by the chief or governor of the Cherokee Nation, this may be said: That the sixth section of the act of June 28, 1898, does not, in terms, provide that the complaint filed in such cases shall be sworn to by the chief or governor of the tribe in person. The provision of the act is that "a sworn complaint" shall be filed; not that the complaint shall be verified by the chief or governor of the tribe in person. The amended complaint on which the case was tried was sworn to in due form by "one of the attorneys for the Cherokee Nation in this action." The affidavit made contains the further statement that the affiant "knows the facts contained in the within and foregoing amended complaint, and the same are true." We are of opinion that this was a sufficient verification, it having been made by an agent and authorized attorney of the Cherokee Nation to satisfy the requirements of the statute.

Another point was made by counsel for the plaintiffs in error on the oral argument of the case, although it is not mentioned in the brief; the point being that the trial court erred in entering its judgment in awarding damages against the defendants for a greater sum than was prayed for in the complaint. This point seems to be well taken, and it appears upon the face of the record. The amended complaint alleged that the rental value of the premises in controversy was \$400 per annum, and that the nation was entitled to the rents and profits "since the institution of this suit." The suit was brought on May 30, 1899, and the judgment was rendered on February 8, 1901, so that in no event was the plaintiff entitled to recover in this action a greater sum than the value of the rents and profits for one year eight months and nine days, or, in the aggregate, the sum of \$677.77. The trial court in fact allowed the plaintiff, as damages, a sum sufficient to cancel the nation's indebtedness to the defendants for the appraised value of their improvements, to wit, the sum of \$1,344, which sum had been tendered to them before the suit was brought, but was not accepted; and it also rendered a judgment against the defendants for the sum of \$337.50. In other words, the trial court appears to have awarded damages amounting in the aggregate to \$1,681.50, and to have entered the judgment in such a form as to cancel and extinguish the defendant's claim against the nation for the appraised value of their improvements. A judgment to this extent, and having such an effect, was not authorized by the pleadings, since a judgment in a legal proceeding for an amount

greater than is claimed by the plaintiff in his complaint is erroneous, and will be reversed on appeal, although the judgment may be sustained by the evidence. *Cauthorn v. Berry*, 69 Mo. App. 404, 412; *Moore v. Dixon*, 50 Mo. 424; *Wright v. Jacobs*, 61 Mo. 19; *Armstrong v. City of St. Louis*, 3 Mo. App. 100, 106; *Corning v. Corning*, 6 N. Y. 97, 105. Moreover, as the defendants did not plead the value of the improvements that had been tendered to them by the nation as a counter-claim or set-off against the demand for the rents and profits of the land, we fail to perceive that the trial court, in the absence of such a plea, had any power to allow such a set-off in this proceeding, thereby extinguishing the claim of the defendants against the nation for the appraised value of their improvements. Because of this error we think the existing judgments should be reversed and annulled, and that the case should be remanded to the trial court, with directions to that court to enter a judgment in favor of the Cherokee Nation for the possession of the land and improvements in controversy; also a judgment in its favor against the defendants for the rental value of the property from May 30, 1899, to February 8, 1901, in the sum of \$677.77; leaving the parties at liberty to adjust the claim for the assessed value of the improvements as they may be advised.

It will be so ordered, and that the costs in this case on appeal be taxed against the Cherokee Nation.

(129 Fed. 196.)

CALLISON v. BRAKE

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,319.

1. WRONGFUL DEATH—ACTION FOR DAMAGES—INSTRUCTIONS.

Instructions in an action by an administrator to recover damages for wrongful death under the statute of Florida considered and approved, as in conformity with a prior decision of the court.

2. STATUTES—MANNER OF ENACTMENT—CONSTITUTIONAL REQUIREMENTS.

Where a bill introduced into the Florida Senate was regularly passed by a call of the yeas and nays and referred to the House, where on its second reading a substitute was introduced by the judiciary committee, regularly passed, and forwarded to the Senate, the fact that the Senate treated the substitute as an amendment of the original bill, and concurred in it without the formality of a roll call, did not invalidate the act on the ground that it was not passed in conformity with the state Constitution, which requires the yeas and nays to be taken on the final passage of a bill.

3. WRONGFUL DEATH—ACTION FOR DAMAGES—JOINDER OF CAUSES OF ACTION UNDER DIFFERENT STATUTES.

Rev. St. Fla. 1892, §§ 2342, 2343, authorize actions for wrongful death to be brought, among others named, by the executor or administrator of the deceased; the measure of damages in such case being the loss to the estate. Such sections were supplemented by Laws 1899, p. 114, c. 4722, which authorizes an action for the wrongful death of a minor child by the father or mother of such child, in which the plaintiff "may recover, not only for the loss of services of such minor child, but, in addition thereto, such sum for the mental pain and suffering of the parent or parents as

¶ 3. See Death, vol. 15, Cent. Dig. § 22.

the jury may assess." *Held* that, where the father of a minor who was killed was also the administrator, he might sue for the death in both capacities in the same action, joining counts under each statute in the same declaration.

In Error to the Circuit Court of the United States for the Southern District of Florida.

For opinion below, see 122 Fed. 722.

This is an action by the plaintiff, as administrator of the estate of Gerard H. Brake, deceased, to recover damages from the defendant for alleged wrongful act or acts, or negligence, or default on the part of the defendant, alleged to have been the cause of death of Gerard H. Brake. The statement of the plaintiff's case is set forth in his declaration in four separate and distinct counts; that is, each of these four separate counts is a statement of a claim contended for by plaintiff against defendant, Callison. In the first count, plaintiff alleges in substance that the defendant, as the lessee of county convicts for the county of Alachua and state of Florida, had, in the month of November, 1901, Gerard H. Brake, son of the plaintiff, aged at that time about 16 years, in his custody as lessee, said Brake having been committed as a prisoner of said county, and that the defendant, as such lessee of the county convicts, became obligated to furnish support, care, and maintenance to the said Brake, and that the said Brake was during such time sick and ailing, and in feeble and infirm health, all of which is alleged to have been well known to the defendant, and that the defendant failed and neglected and refused to permit decedent proper opportunity for rest, and compelled him to toil immoderately, and failed and neglected to furnish said Brake with necessary medicine and medical attendance and personal care, in consequence whereof said Brake languished and died, whereby the plaintiff has lost and been deprived of the services of the said Brake to the value of \$5,000, and that the plaintiff and the plaintiff's wife, mother of the said Brake, have been submitted to great mental pain and suffering, to their damage in the sum of \$20,000. This count of the declaration in brief claims that, by reason of the neglect of the defendant to furnish proper clothing, medical attention, and comfortable quarters, and by reason of having compelled said Brake to work immoderately the said Brake died, to the damage of the plaintiff as alleged. The third count in substance sets forth substantially the same facts as were set forth in the first count as to the decedent, Gerard H. Brake, being in the custody of the defendant as lessee of the county convicts of the county of Alachua, Fla., and then alleges that the said Brake, at the time of such imprisonment by the defendant, was sick and ailing, and in feeble and failing health, and unfit for work, and that the defendant, knowing said Brake was sick and ailing, urged and insisted that the said Brake engage in labor disproportionate to his strength, and by way of coercing the said Brake to labor the defendant caused and procured said Brake to be immoderately beaten and bruised upon and about the body and limbs, in consequence whereof the said Brake languished and died, to the damage of the plaintiff for loss of services of the said Brake of \$5,000, and for mental pain and suffering of the plaintiff and plaintiff's wife to the sum of \$50,000. The second count of the declaration, after setting up the same facts as to the imprisonment of Gerard H. Brake in the county convict prison of Alachua county, and his custody by the defendant as lessee of the said convicts, and after alleging it to be the duty of the defendant to furnish support, care, and maintenance to the said Brake, and stating that during such imprisonment the said Brake was sick, ailing, and in feeble and infirm health, to the knowledge of the defendant, alleges that the said defendant failed and neglected to provide the said Brake with comfortable quarters, good bedding and blankets, and wholesome food, and also refused to permit Brake to have proper rest, and compelled him to toil immoderately, and also failed to furnish decedent with necessary medicine and medical and personal attendance, in consequence of which the said Brake languished and died, to the damage of the plaintiff, as administrator, by the loss of earnings which the decedent in his lifetime would have made, to the extent of \$25,000. The fourth count of the declaration, after setting up the

facts of the imprisonment of Brake and his custody as such prisoner by the defendant, then alleges that the said Brake, while thus imprisoned, was sick, ailing, and in feeble and infirm health, and unfit for work, that the defendant urged and insisted that the decedent engage in labor disproportionate to his strength, and by way of coercing the said Brake so to labor defendant caused and procured Brake to be immoderately beaten and bruised upon and about the body and limbs, in consequence whereof Brake languished and died, and by said wrongful acts of the defendant the plaintiff, as administrator, suffered great damages by loss of earnings which the said Brake in his lifetime would have made, to wit, \$25,000. The plaintiff claims as total damages for the causes of action set forth in all counts of the declaration \$75,000.

The defendant is charged, therefore, with two classes of torts: First, offenses of omission, or rather a failure to provide suitable and satisfactory subsistence, quarters, bedding, and blankets, proper opportunities for rest, necessary medicine and medical attendance and personal care. The testimony is conclusive of the relations existing between the deceased and the defendant. The deceased was a convict, and the defendant was, in accordance with the law, the keeper and custodian of the deceased, and as such custodian of the deceased, and as such custodian and keeper, it was his duty to furnish the deceased with all reasonable means and opportunity for health and welfare, as far as the circumstances would justify. The defendant cannot be held responsible for the position of the deceased as a convict, in which he was found; but it was his duty to provide him suitable quarters, bedding, and blankets, necessary medicine, and attendance, such as might be required by the physical condition of the convict. The foregoing statement of the case we have adopted from the opening paragraphs of the charge given to the jury by the trial judge.

Bisdee & Bedell, for plaintiff in error.

Evans Haile, S. Y. Finley, E. P. Axtell, C. D. Rinehart, and Horatio Davis, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge (after stating the facts as above). In the opinion of the majority of this court, the judgment of the Circuit Court in this case should be affirmed. We do not deem it necessary to notice in detail, and in the order in which they have been presented by the respective counsel, the questions which were raised on the trial and have been submitted to us on the hearing of this writ of error. We notice only a few of the points, which we deem require some attention.

The trial judge, amongst other things, in the charge which he gave the jury on his own motion, instructed them substantially that the liability of the defendant, under the declaration, is based upon two statutes, under one of which this suit is brought by the plaintiff as administrator, and under which the defendant may be liable for any act of a servant, agent, or employé, acting by the authority of the defendant; but in such case the damages are limited to the actual injury suffered by the plaintiff in such character of administrator—that is, the value of the estate. Later on, he instructed further to the effect, substantially, that under the second and fourth counts of the declaration the defendant would be liable for any act or negligence of any agent or employé of his, acting in the line of duty to which he had been appointed, or for which he had been employed; but for such act or negligence nothing could be recovered for mental suffering or for the services of the deceased before he reached the age of 21. So, if you

find the defendant liable under these counts, the only damages that can be given would be such as would be coming to the plaintiff as administrator; that is, the present worth of what you find the deceased would have accumulated during his natural life, considering his probable earnings, expenses, and savings, and the probable length of his life. Of these matters you are the sole judges according to your best judgment. The jury should take into consideration the age, occupation, habits, character, and ability, mental and physical, of defendant, and the probable continuance of his life, in arriving at this estimate.

In reference to the other counts under the declaration, the trial judge instructed the jury to the effect that, if you find for the plaintiff upon the issues of either of these counts, it will be necessary for you to determine the damage that plaintiff has suffered. Under these counts the defendant can only be held liable for his own personal acts or negligence. If you find the death of the deceased was caused by such personal act or negligence, damage may be allowed the plaintiff, as parent, for the net services of deceased until he reached the age of 21 years, making allowance for all expenses of his education and support, and for the mental pain and suffering of his parents. There is no rule by which these can be determined, except by your own judgment under the light of all the circumstances and the evidence in the case. You are to take into consideration all the facts and circumstances, and upon the testimony, tested by your own general knowledge of human nature, determine in your own mind what was the distress and anguish of mind, the mental pain and suffering, of these parents, caused by the death of their son under these circumstances; and upon your deliberate judgment and individual conscience make such an award as you deem just.

The statutes of Florida, to which the trial judge referred, and under which the action was brought, are sections 2342 and 2343 of the Revised Statutes of the State of Florida of 1892, and chapter 4722, p. 114, of the Laws of Florida, approved June 3, 1899. The provisions of these statutes, so far as they affect this case, are as follows:

"Sec. 2342. Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual, * * * and the act, negligence, carelessness or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then, and in every such case, the person who would have been liable in damages, if death had not ensued, shall be liable to an action for damages, notwithstanding that the death shall have been caused under circumstances as would make it in law amount to a felony.

"Sec. 2343. Every such action shall be brought by, and in the name of, the widow or husband, as the case may be, and where there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither widow, nor husband, nor minor child or children, then the action may be maintained by any person or persons dependent upon such person killed for a support; and where [there] is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed, and in every such case the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed."

Chapter 4722, § 1. "Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness, or default of any individual, * * * the father of such minor child, or if the father be not living, the mother, as the legal representative of such deceased minor child, may maintain

an action against such individual, * * * and may recover, not only for the loss of services of such minor child, but in addition thereto such sum for the mental pain and suffering of the parent or parents as the jury may assess."

In this case the issues which were presented and decided by the Circuit Court, affecting so much of the action as looks to sections 2342 and 2343 of the Revised Statutes of Florida of 1892, are substantially the same as those which were presented in the case of *Sullivan*, by administrator, v. The Florida Central P. R. Co., which was heretofore tried in the same Circuit Court, and brought by writ of error to this court under the style of "*Florida Central & P. R. Co. v. Sullivan*," and here affirmed, as appears from the report of our action thereon in 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410. In the case we are now considering the learned judge of the Circuit Court, who had formerly tried the *Sullivan* Case, followed substantially herein the rulings that he made therein, and which we had affirmed, as to the right of the administrator to sue, the right to recover under these statutes, and the measure of damages; and, as we have seen no occasion to change the views then expressed, we must, on the authority of that case, hold that, as to so much of this case as rests on those sections of the Revised Statutes, the Circuit Court did not err in its rulings and action.

The effort herein to recover under the act of June 3, 1899, occasioned the presentation of two questions which we ought to notice:

First, whether that act was constitutionally passed by the Legislature of Florida? The counsel for the plaintiff in error, assuming, on the authority of *State v. Hocker*, 36 Fla. 358, 18 South. 767, and *Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154, that this court takes judicial notice of the journals of the Legislature of Florida to ascertain whether or not a bill has been constitutionally passed into a law, prints in his brief "extracts from the journals of the Legislature of Florida for its session of 1899, showing all the entries relating to the supposed passage of chapter 4722, p. 114, of the Laws of Florida, the act on which the first and third counts of the declaration are based." We have examined these journal entries with minute care, and, in connection therewith, the decisions of the Supreme Court of Florida in the case of *State v. Hocker*, supra, and *State v. Dillon*, 42 Fla. 95, 28 South. 781, and we conclude that the record of the action of the Legislature, read in the light of the decisions of the Supreme Court of Florida, does not support the objection made by the plaintiff in error to the validity of the act in question.

The other question is whether recovery under both statutes may be sought and had by the administrator in his character as legal representative in one action? The later statute is recent, and no decision under it is reported. Its language appears to authorize recovery under both, when the administrator is the father or the mother of the deceased. The damages in each case grow out of the same transaction. The proof, in the very nature of the case, must be substantially the same in each as to the wrong done and as to the liability of the defendant. The action is by one natural person as the legal representative of one intestate decedent, and against one natural person, to recover damages for wrongfully causing the death of the deceased. The later statute seems to supplement the earlier one, and to carry the remedy, in the

same direction, farther towards completion. The time, place, and circumstances of the wrong alleged to have been done are the same. The nature of the relief sought is the same. It seems to us that to conclude and hold that in such suit there is a misjoinder of parties plaintiff, or a misjoinder of causes of action, would involve the surrender of our faculties to the duress of distinctions which, in the olden time, learned experts in the science of pleading treated as substantial, but which in their essence are shadowy and highly technical.

The judgment of the Circuit Court is affirmed.

(129 Fed. 201.)

BRAKE v. CALLISON.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,332.

1. BANKRUPTCY—ACT OF BANKRUPTCY.

A conveyance of property by a debtor to creditors cannot be charged as an act of bankruptcy, where he had at the time no other creditors.

2. SAME—INVOLUNTARY PROCEEDINGS—WHO MAY MAINTAIN.

A judgment creditor cannot maintain a petition in bankruptcy against his debtor on an allegation that the latter made a conveyance of property to creditors which constituted an act of bankruptcy before the rendition of the judgment, where it does not appear that the demand on which it was rendered was one provable in bankruptcy, so as to make him a creditor at the time the conveyance was made.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Florida, in Bankruptcy.

Bisbee & Bedell, for petitioner.

E. P. Axtell, C. D. Rinehart, and Jno. E. Hartridge, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, delivered the opinion of the court.

On May 16, 1903, the respondent, N. A. Callison, for a recited consideration of \$12,000 to him in hand paid, conveyed to H. F. Dutton, J. G. Nichols, and W. G. Robinson, as partners, a large amount of real and personal property. The deed was filed for record on the day of its date, and recorded May 18, 1903. On May 29, 1903, the petitioner, William J. Brake, as administrator of the estate of Gerard H. Brake, deceased, recovered a judgment at law against the respondent in the Circuit Court of the United States for the Southern District of Florida, for the sum of \$6,000 damages and \$189.25 cost, whereupon execution issued out of that court, and the judgment remains in full force and effect, unsatisfied, and in no wise reversed or made void. On September 9, 1903, the petitioner presented to the District Court, as a court of bankruptcy, his petition against the respondent, making the formal allegations necessary to show the jurisdiction of the court, including the averments as to the nature and amount of his claim, as substantially recited above, and charging that the respondent is insolvent, and within four months had by his certain deed (above referred to) conveyed, transferred, concealed, removed, and permitted to

be concealed and removed, a part of his property, with the intent to hinder, delay, or defraud his creditors, or some of them; that the respondent was, on the day of the date of the deed, indebted to the grantees therein, and made the conveyance with the intent to prefer such creditors over his other creditors; and that the deed was, in effect, a general assignment for the benefit of creditors. To this petition the respondent, by counsel, submitted a demurrer, and for grounds thereof alleged: First, it does not appear from the petition that the respondent, on the 16th day of May, 1903, had any creditors, within the meaning of the bankrupt act, who are entitled to complain of the transaction complained of in the petition; second, because it appears from the statements contained in the petition that the petitioner was not a creditor of the respondent at the time of the transfer complained of, and is not entitled to file a petition in bankruptcy, within the meaning of the bankrupt act (Act July 1, 1898, c. 541, § 1, 30 Stat. 544, 545 [U. S. Comp. St. 1901, p. 3419]). Three other grounds are assigned, but it is not necessary that they should be specially considered. The District Court sustained the demurrer on each of the grounds above stated, with leave to the petitioner to amend as advised. No amendment was tendered, and this petition for review was allowed.

The counsel for the petitioner submits that the case presents the question whether a creditor, having a provable claim, may file a petition, irrespective of whether he had such claim at the time of the commission of the act of bankruptcy complained of. Redacting this proposition, and dispensing with its abstract features, the case presents to us the question whether, under the conditions shown by the petitioner at the date of the conveyance by the respondent, his conveyance of his property constituted an act of bankruptcy. So far as shown by the petition, the grantees in his deed were his only creditors at that time. It could not be an act of bankruptcy as to them. As to the parties to that deed, it was manifestly a valid conveyance. It is said in *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670 (we quote the syllabus):

"A creditor of a grantor of real estate, attacking the conveyance as made to defraud creditors, should show affirmatively that he was a creditor of the grantor when the alleged fraudulent conveyance was made."

Referring to the grantor in that case, the concluding sentences of the opinion are in these words:

"He had a right to dispose of his property in the ordinary course of business for a valuable consideration, and the defendant (the grantee) had a right to purchase it. The complainant, not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud."

The petition to the bankrupt court alleges no facts, other than those already stated, showing or tending to show that the conveyance in question was executed as a cover for future schemes of fraud. There is no allegation that the petitioner had any claim of any kind against the respondent prior to the date of the rendering of the judgment which he obtained. The allegation is simply that it was a judgment for damages, without indicating whether they grew out of a breach of contract, express or implied, or were recovered on account of a tort. As de-

financed by the bankrupt act, the term "creditor" includes any one who owns a demand or claim provable in bankruptcy, and the term "debt" includes any debt, demand, or claim provable in bankruptcy. It not appearing that at the time of the respondent's conveyance there were any other creditors than those to whom he conveyed, and it appearing expressly that the petitioner was not a creditor of respondent at that time, we conclude that the demurrer to the petition was well taken on the first and second grounds. *Beers v. Hanlin* (D. C.) 99 Fed. 695; *In re Brinckmann* (D. C.) 103 Fed. 65. As this disposes of the case, it is unnecessary to notice the other grounds.

The petition for revision is dismissed.

(129 Fed. 203.)

CAREY v. BILBY et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. March 7, 1904.)

Nos. 1,929, 1,930.

1. TORTS—JOINT TORT FEASOR—RELEASE OF ONE—CONSTRUCTION—EFFECT.

Plaintiff, claiming a right of action for damages against C. and H. jointly for alleged fraudulent misrepresentations in the sale of cattle, accepted a certain amount of money from H., and executed a release discharging him from any and all liability by reason of such misrepresentations, and agreeing to indemnify him from being compelled to pay any further sum by reason thereof. The release, however, expressly provided that plaintiff did not relinquish or release any action or cause of action against C. by reason of the premises, but reserved his right to sue C. or the firm of C. Bros. on such cause of action. *Held*, that such instrument should not be treated as a technical release terminating plaintiff's cause of action against all the joint tort feasors, but as a covenant not to sue H., and was therefore no defense to an action against C.

In Error to the Circuit Court of the United States for the District of Nebraska.

John S. Bilby and Russell I. Bilby, the defendants in error in case No. 1,929, brought an action against John L. Carey, the plaintiff in error, to recover certain damages for injuries which they claimed to have sustained in consequence of their being induced by the defendant, Carey, to purchase from him certain Texas cattle through false representations. John S. Bilby and John E. Bilby, the defendants in error in case No. 1,930, brought a similar action against John L. Carey, plaintiff in error. The complaints in the two cases were substantially alike, except that in case No. 1,929 the damages claimed by the plaintiffs below were \$13,611, whereas the damages claimed in case No. 1,930 was the sum of \$3,809. The complaints stated, in substance, that in the month of May, 1897, the defendant, Carey, and one C. J. Hysham were the owners of 755 head of cattle, which had been shipped by them from the state of Texas to the city of St. Joseph, Mo.; that said Carey and Hysham offered to sell to the plaintiffs below certain of said cattle, and, to induce them to buy, represented that the cattle had been kept during all of the preceding winter and spring in a part of the state of Texas, which was entirely free from, and not infected with, a certain contagious disease commonly known as "Spanish Fever," and that they had not been driven over or in the vicinity of any territory in the state of Texas which was infected by said disease, and had not been exposed thereto, but were in a sound and healthy condition; that, relying on this representation, and believing the same to be true, they purchased a certain number of the cattle from Carey

¶ 1. See Release, vol. 42, Cent. Dig. §§ 68, 71.

and Hysham, and paid them therefor; that the representations aforesaid, at the time they were made, were known to the vendors of the cattle to be untrue; that they also knew that the purchasers of the cattle would pasture them on lands in the state of Missouri with a large number of Missouri and other native-born northern cattle; that they were so pastured by the vendees, after they were purchased, with other northern-bred cattle; that, in consequence of their being affected with the contagious disease aforesaid, they communicated the disease to other cattle with whom they were herded, which belonged to the plaintiffs below, and that in consequence thereof the plaintiffs lost a large number of cattle of great value, and that they were damaged in the one case to the amount of \$15,840 and in the other case to the extent of \$4,580, in consequence of the disease in question being communicated to their respective herds. The plaintiffs below further alleged that they had been paid by C. J. Hysham, on account of the damages claimed in case No. 1,929, the sum of \$2,229, and that they had been paid by C. J. Hysham, on account of the damages claimed in case No. 1,930, the sum of \$771, leaving a balance of damages due to them in the one case in the sum of \$13,611 and a balance due to them in the other case in the sum of \$3,809.

Among other allegations contained in the defendant's answer it was admitted that the plaintiffs had received from C. J. Hysham the sums of money alleged in the complaints, and it was alleged that the sums so paid to the plaintiffs by Hysham were received and accepted by said plaintiffs in full release, satisfaction, and discharge of the pretended causes of action sued upon in said actions, and in full release of said Hysham from all liability thereon. On the trial of the cases the receipt which was signed by the plaintiffs when the sums of money were paid to them by C. J. Hysham was introduced in evidence, and was of the following purport:

"Whereas, on or about the ——— day of May, 1897, T. J. Hysham acting for C. J. Hysham or C. J. Hysham & J. L. Carey, as partners or either of them, purchased for said C. J. Hysham or C. J. Hysham & J. L. Carey as partners, or either of them, certain cattle of Comer Bros., in the State of Texas, and

"Whereas, said cattle were shipped from the State of Texas and were sold and delivered by said C. J. Hysham or C. J. Hysham and J. L. Carey as partners, or either of them, to J. S. Bilby in St. Joseph, Missouri, on or about the ——— day of May, 1897, and

"Whereas, said J. S. Bilby did on the day last above named receive from said C. J. Hysham, or C. J. Hysham & J. L. Carey as partners, or either of them, at St. Joseph, Missouri, about 756 of said cattle, and did at said time execute and deliver to the said C. J. Hysham his certain promissory note for the purchase price of said cattle, together with a chattel mortgage on said cattle thus bought by him securing said note, and

"Whereas, the said J. S. Bilby has since paid off and discharged said note and mortgage, and

"Whereas, after buying said cattle said Bilby took the same to his farms described in said chattel mortgage, and

"Whereas, after taking said cattle to his farm, the said Bilby claims that many cattle owned by him or others have died, and that many other cattle became sickened and impoverished, and

"Whereas, the said Bilby claims that the said cattle thus dying and the others thus becoming sickened and impoverished was caused by reason of what is commonly called the Spanish or Texas fever, and

"Whereas, the said Bilby claims the said Spanish or Texas fever was imparted or conveyed by the cattle that he thus bought at St. Joseph, Missouri, as aforesaid recited.

"Now, therefore, in consideration of the sum of \$3,000.00 to me in hand paid by T. J. Hysham and C. J. Hysham, and the further consideration of the said T. J. Hysham and C. J. Hysham having assigned to me all claims and causes of action that they, or either of them have against the said Comer Bros., growing out of or in any way connected with the said purchase of said cattle from said Comer Bros., I, J. S. Bilby, fully release and discharge him, the said T. J. Hysham, and the said C. J. Hysham from any and all liability by reason of each, all and every of the foregoing matters and things, and re-

lease him, the said T. J. Hysham and the said C. J. Hysham from any and all liability in any way connected with or growing out of the aforesaid matters. And I will indemnify, protect and save harmless the said T. J. Hysham and the said C. J. Hysham from paying any further sum to any person or persons whatsoever, on account of any or all the matters set forth in this contract.

"But it is expressly and specifically understood in the execution and delivery of this paper that I do not relinquish or release any action or causes of action that I may now or hereafter have against him, the said J. L. Carey, or them, the said Comer Bros., or either of them by reason of any of the matters or things hereinbefore recited, expressly and specifically reserve to myself the right to maintain in said action or actions against him, the said J. L. Carey, or them, the said Comer Bros., or either or all of them by reason of said matters and things or any of them that I now have or may hereafter have.

"Signed this second day of August 1898.

John S. Bilby."

The trial below resulted in a verdict in favor of the plaintiffs in case No. 1,929 for the sum of \$2,229 and in a verdict in favor of the plaintiffs in case No. 1,930 for the sum of \$771, on which verdicts judgments were subsequently entered. The defendant below has brought the cases to this court on writs of error.

John C. Cowin, for plaintiff in error.

James W. Hamilton (H. E. Maxwell, on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the conclusion of the evidence on the trial below, counsel for the defendant requested a peremptory instruction to find a verdict in favor of his client. This instruction was asked, as it seems, on the sole ground that the release which had been executed by the plaintiff Bilby in favor of T. J. Hysham and C. J. Hysham operated as a release of the defendant, Carey, although it was not so intended, and that no action could be maintained against him in consequence of the execution of this instrument. The trial court denied the request, holding that the release in question did not have the effect claimed for it. It is conceded by counsel for the plaintiff in error that the only question for determination by this court is whether the trial judge was right in his view that the release did not operate as a discharge of the cause of action against Carey.

It is an old and well-established rule of law that the release of a cause of action as against one of two or more joint tort feorsors or joint obligors operates as a release of all. This is upon the theory that when one has received full compensation for a wrong, no matter from which wrongdoer or from what source, the law will not permit him to recover further damages. *Lovejoy v. Murray*, 3 Wall. 1, 17, 18 L. Ed. 129. When a release of a cause of action for a tort is given by the injured party to one of two or more persons who committed the wrong, the release is construed most strongly against the party executing it. The law indulges in the presumption that the release was given in full satisfaction for the injury, and upon a sufficient consideration, and will not permit the presumption to be overcome by oral proof to the contrary. *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518,

520, 36 Am. Rep. 830; *Bronson v. Fitzhugh*, 1 Hill, 185, 186. Sometimes, however, as in the case in hand, a release executed in favor of one wrongdoer is accompanied with the reservation of the right to sue others who were jointly concerned in the wrong, and in such cases the question has frequently arisen, how shall such an instrument be interpreted? Shall the reservation of the right to sue others be ignored, and the instrument treated as raising a conclusive presumption that full compensation for the wrong has been made, as though it were a technical release under seal, or shall the reservation of the right to sue others be taken to mean that full compensation has not been received by the injured party, and that he merely intended to agree with the released party not to pursue him further, but without releasing his cause of action against the other wrongdoers, or admitting that he has received full compensation for the injury? With reference to this question the authorities are not in accord. Some courts are disposed to hold, and have held, that when such an instrument contains apt words releasing one of the joint wrongdoers, it operates to release all, and that any clause inserted therein reserving a right to sue others after one has been released is repugnant to the release, in that it defeats or attempts to defeat, the natural legal effect of the instrument; and that it should therefore be ignored. *McBride v. Scott et al.* (Mich.) 93 N. W. 243, 61 L. R. A. 445; *Abb v. Northern Pacific Ry. Co.* (Wash.) 68 Pac. 954, 58 L. R. A. 293, and cases there cited. Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and that it should not be treated as a technical release operating to destroy his cause of action as against all of the joint tort feorsors, but rather as a covenant not to sue the party in whose favor the instrument runs. *Gilbert v. Finch* (N. Y.) 66 N. E. 133, 61 L. R. A. 807; *Matthews v. Chicopee Mfg. Co.*, 3 Rob. 712; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; *Hood v. Hayward*, 124 N. Y. 1, 16, 26 N. E. 331; *Sloan v. Herrick*, 49 Vt. 327; *McCrillis v. Hawes*, 38 Me. 566; *Miller v. Beck* (Iowa) 79 N. W. 344, 345; *Price v. Barker*, 4 El. & Bl. 760, 776, 777.

We are of opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument, which should always be done when the intention is manifest and it can be given effect without violating any rule of law, morals, or public policy. Besides, we are not aware of any sufficient reason which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers, who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability without releasing his cause of action as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which

they had sustained; that it was not in fact full compensation for the injury; and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey.

The judgments below are therefore affirmed.

(129 Fed. 207.)

RIGGS et al. v. UNION LIFE INS. CO. OF INDIANA. SAME v. AMERICAN CENT. LIFE INS. CO. SAME v. FIDELITY MUT. LIFE INS. CO.

SAME v. NORTHWESTERN NAT. LIFE INS. CO.

SAME v. HARTFORD LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1904.)

Nos. 1,947-1,951.

1. INSURANCE POLICY—FRAUD—REMEDY AT LAW BEFORE LOSS—JURISDICTION IN EQUITY.

Before a loss under a policy of insurance, the company which issued it has no adequate remedy at law for fraud, false representations, or concealments which procured its issue, and a federal court has jurisdiction in equity of a suit for the surrender and cancellation of the policy.

2. SAME—REMEDY AT LAW AFTER LOSS.

After a loss under a policy of insurance, the company which issued it ordinarily has an adequate remedy at law for fraud, false representations, or false concealments which procured its issue by presenting them as a defense to any action that may be brought upon the policy, so that a suit in equity for its surrender and cancellation, commenced after the loss, cannot be maintained in the federal courts in the absence of special facts or circumstances invoking jurisdiction in equity.

3. SAME.

The fact that the action at law on the policy will be brought in a state court does not render the remedy of the company at law in the federal court so inadequate that a suit in equity to avoid the policy, commenced after the loss, may be maintained, where the company has the right to remove the action at law from the state to the federal court.

4. SAME.

Nor does the fact that the license of the company to do business in the state in which the action at law is to be commenced will be revoked if the company removes that action to a federal court render its remedy at law in the federal court so inadequate as to give that court jurisdiction in equity of a suit to cancel the policy.

(Syllabus by the Judge.)

Appeals from the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 123 Fed. 312.

Kendall B. Randolph and R. A. Hewitt, Jr. (W. H. Haynes, James T. Blair, and William M. Fitch, on the brief), for appellants.

W. A. Kerr, Augustin Boice, and Stephen S. Brown (John E. Dolman, on the brief), for appellees.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

¶ 1. See Cancellation of Instruments, vol. 8, Cent. Dig. § 13.

SANBORN, Circuit Judge. These are appeals from orders of the Circuit Court, which granted to the insurance companies interlocutory injunctions against the executors of the last will of Eber B. Roloson and others, who were defendants in these suits in the court below. The injunctions forbid the executors or their codefendants to bring actions at law upon or assign their claims against the insurance companies which are based upon policies of insurance issued by the latter upon the life of Eber B. Roloson, who died on February 28, 1903. The bills in these cases were first exhibited after the death of Roloson. In them the complainants, the insurance companies, allege that they are corporations organized under laws of states other than the state of Missouri, that the defendants are citizens of the latter state, that the amount in controversy in each of the suits is more than \$2,000, that the defendants in each case conspired together to procure and did procure the complainant in that case to issue a policy or policies of insurance which constitute the subject of that suit by fraudulent representations and concealments, that the complainants have procured their licenses to do business in many of the states upon the condition that they will not remove actions or suits brought against them in the courts of the states to the courts of the nation, and that the executors will, if not enjoined by the court, assign their claims under the policies, and cause actions to be brought upon them in the courts of some state, so that the insurance companies cannot remove these actions to the federal courts without incurring the penalty of a revocation of their licenses to do business in that state. No demurrers or answers were interposed in these suits, and the cases stand upon the bills and upon the orders for the injunctions. These orders are challenged by the defendants on the ground that the complainants had an adequate remedy at law, so that the court below was without jurisdiction of the suits in equity, because, if the insurance companies are sued upon the policies, they may remove the actions to the federal courts, and the fraudulent representations and concealments which induced the issue of the policies will constitute perfect defenses to those actions.

Whatever doubt there may have been of the jurisdiction in equity of the court below over these suits when the learned District Judge considered that question and issued the injunctions has been dispelled by the later decision of the Supreme Court in *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188. Before the loss under an insurance policy occurs, a company has no adequate remedy at law for the fraudulent representations or concealments which induce its issue, because an estoppel from denying its validity may arise in favor of third persons who advance their money in reliance upon it, and because the time when an opportunity will be offered to establish the fraud as a defense to an action upon the policy is so remote and uncertain that indispensable witnesses and evidence may, and probably will, disappear before the opportunity will be offered. Hence a federal court sitting in equity has jurisdiction of a suit instituted before the loss under a policy occurs to compel its cancellation and surrender on account of fraud or misrepresentation in its procurement, and after the court has thus acquired jurisdiction by the commencement of the suit before loss it may proceed to a final decree, although the

loss occurs during the pendency of the suit, and before the final hearing. Bacon on Benefit Societies and Life Insurance, § 285; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Home Ins. Co. v. Stanchfield*, 12 Fed. Cas. 449, No. 6,660; *Benefit Ass'n v. Parks*, 81 Me. 79, 16 Atl. 339, 10 Am. St. Rep. 240.

But the decision of the Supreme Court in *Cable v. U. S. Life Ins. Co.* has placed this proposition beyond doubt or debate: After a loss under a policy the remedy of the insurance company at law for fraud, false representations, or concealments which induced its issue by presenting them as a defense to the action that may be brought upon the policy is not inadequate because that action may be brought in a state court, where the defendant will have the right to remove it to a federal court, although its removal to the latter court may result in a revocation of the license of the insurance company to do business in that state, nor because a defendant has no choice of the time or place of the commencement of such an action, and less control of its conduct than the plaintiff, and a suit in equity to cancel the policy and to prevent an action at law upon it cannot be maintained in the federal courts upon these grounds. The jurisdiction of the court below in equity is invoked for no other reason that is worthy of consideration or discussion, and the orders which granted the injunctions must be reversed, and the cases must be remanded to the Circuit Court for further proceedings not inconsistent with the views expressed in this opinion, upon the authority of *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; and it is so ordered.

(129 Fed. 209.)

THE EDITH L. ALLEN.

(Circuit Court of Appeals, Second Circuit. March 11, 1904.)

No. 132.

1. SALVAGE—RESCUE OF STRANDED SCHOONER—REDUCTION OF AWARD.

A salvage award of \$6,500 for the rescue of a schooner valued, as saved, with her cargo and freight, at \$32,800, which was stranded on the coast of New Jersey, reduced on appeal to \$4,500; it appearing to have been increased to some extent by a misapprehension by the trial judge of the facts shown by the evidence as to the peril of the stranded vessel.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 122 Fed. 729.

This cause comes here upon appeal from a decree of the district court, Southern District of New York, awarding to Neal, as owner of the tug *Somers N. Smith*, and to the American Salvage Company, which had a crew on board said tug, the sum of \$6,500 salvage for pulling the schooner *Edith L. Allen* off the eastern edge of Brigantine Shoal, on the coast of New Jersey, and towing her to the port of New York. The decree further awarded to Neal the sum of \$1,700 for damages alleged to have been sustained by the tug during the salvage operation. The appellant contends that the court erred in awarding anything for damages to the tug, and that the amount of salvage awarded is excessive. It is not disputed that salvage service was rendered. The value of the schooner, as saved, her cargo and freight, was \$32,800. The

† 1. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

value of the tug, specially equipped with the best appliances for wrecking, was \$50,000.

Edward G. Benedict, for appellant.

Henry G. Ward, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The opinion of the District Court will be found reported in 122 Fed. 729. It sets forth the facts so fully that it is not necessary to undertake to restate them here. It will be understood that the conclusions of this court are based thereon, with such modifications only as are hereinafter set forth.

While hauling on the schooner, February 3, 1902, the tug struck bottom, certainly twice, possibly three times. These blows were very severe ones. The engineer testified that he was at the throttle, handling the engines, at the time, and that the blow came very near throwing him down off his feet, and made the tools rattle in the fireroom, and also shook the coal bunkers, boilers, and pipes in the engine room. There were big swells running at the time, and she struck twice, at least, between swells. So they paid out the hawser, and got into deeper water. The day before, while near another stranded vessel, and before the salvage service of the Allen was undertaken, the tug also touched bottom, but that was a very slight contact—she “just nudged the bottom”—whereas, when she struck while hauling on the Allen, “it was a harder strike. She came down on something, and it jarred her all over.” The tug is a steel boat, with a double bottom; the spaces between the floors being filled up with cement and pig iron, making a very solid structure. No leak developed after the blows testified to, and no survey of her bottom was made till she was put on dry dock, two months later, for her usual spring overhauling. It was then discovered that her port side was damaged about amidships under the boilers. some of the garboard streak plates were bent, and had to be taken off and renewed, and the vertical floor under the forward fireroom bulkhead was bent, buckled, and distorted so that several frames had to be straightened. No holes were punched through the plates, but they were fractured on the inside and at the rivet holes. The mechanic who made the repairs had attended to the tug at her overhauling the spring before, and testified that these injuries did not then exist. Her master testified that he had been by the tug the whole of the time since the prior overhauling—“every day, never been off her two hours”—and that she never struck bottom during that period, except on the occasions above set forth. Upon this uncontradicted evidence, the district judge was warranted in finding that the injuries to the tug’s bottom were sustained during the salvage service, and his award therefore was proper.

The amount awarded for salvage rests usually in the discretion of the court awarding it. Nevertheless, in *The Bay of Naples*, 48 Fed. 739, 1 C. C. A. 81, we held that:

“Appellate courts will look to see if that discretion has been exercised by the court of first instance in the spirit of those decisions which higher tribunals have recognized and enforced, and will readjust the amount if the decree below does not follow in the path of authority, even though no principle has been violated or mistake made.”

And a readjustment will more readily be made if the award below appears to have been enlarged through some misapprehension of the facts.

It is apparent that the salvors have been awarded a very high percentage of the amount salvaged. The appellant has submitted a list of all salvage cases found in the Federal Reporter down to date (say volume 124), where wooden vessels have been rescued from a stranded situation on the Atlantic Coast. They are given in a note, as a convenient supplement to the list given in the note to *The Lamington*, 86 Fed. 675, 30 C. C. A. 271. In the case at bar an important circumstance is the condition of the tide at stranding and until rescue. The schooner stranded on the eastern edge of the shoal during a strong squall from the northwest (offshore), which blew her headsails to pieces, so that she came up to the wind; and, before they could get her off, she was ashore. This was on Sunday, February 2d, at about 5:30 p. m. The wind had been easterly, but by 11 a. m. it had shifted to the west, and blew from the west and northwest until the stranding, increasing in violence. It had been blowing hard offshore for certainly four hours before the "living gale" in which the master of the schooner says she went ashore, with the natural result of somewhat flattening the sea and holding back the water. There is conflict between the weather records at Atlantic City, six miles distant, and the witnesses from the life-saving stations near Brigantine Shoal; but it may fairly be assumed, as libelants contend, that during the night of Sunday, and during Monday and Monday night until near midnight, there was a heavy offshore blow. The heaviness of the blow was not an especial peril to the schooner, since she was not far enough offshore for the wind to make much of a sea; and, had she been blown off, she would not have sunk, because her leaks, as the event showed, were not beyond the control of the pumps. This strong offshore wind, however, prevented the natural rise of the tide. In consequence the tug strove in vain to haul her off—for two hours at high tide Monday afternoon, and again for a like time at the next high tide, early Tuesday morning. Thereafter, however, there came a change in the wind, which ceased to operate to hold back the water, and in consequence the next tide came in with an unusual rush; and on the third pull, which began about 1 p. m. Tuesday, February 4th, the schooner came off the shoal about 2:30 p. m., without any difficulty, and when the tide was only half high. If this change in the wind had been one from offshore to onshore, the schooner's position would have been serious, because, being without headsails and heavily iced, as the water lifted her the wind would have driven her aground higher up on the shoal. A change, however, only from a heavy to a light breeze, would not tend to produce such result, and might allow her to get afloat by the use of her own anchor and capstan. The evidence is uncontradicted that this was the only change. The wind fell to less than six miles an hour, and, although for a brief space it backed around to northeast, it remained westerly not only until the schooner was pulled off, but during all the rest of the week. It would seem, however, that the district judge was under the impression that the wind changed in direction as well as in velocity. He says:

"There can be little doubt that * * * the schooner was in great danger of becoming a total loss, from a change of the wind to the eastward, which

was impending, and in fact occurred before the schooner was floated." And again: "The change in the wind, which brought a normal state of the tide, was, of course, an extremely important feature in the proceeding. * * * It appears here that, in all probability, without the opportune intervention of the salvors, the change of wind, with the consequent increase of depth of water, though it might have caused the schooner to float temporarily, would eventually have driven her higher up on the beach, and led to her total loss."

Manifestly this understanding of situation operated to increase the award beyond what would otherwise have been made, and we think the salvage should be reduced from \$6,500 to \$4,500.

The decree is reversed, with costs of this court to appellant, and cause remanded to the District Court, with instructions to decree in accordance with this opinion; costs of district court to libelants.

NOTE. Salvage cases cited on argument, being all those in the first 124 volumes of Federal Reporter where a wooden vessel has been rescued from a stranded situation on the Atlantic Coast:

| | |
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| Mary E. Long (D. C.) 7 Fed. 364..... | 4 % |
| Maggie Ellen (D. C.) 19 Fed. 221..... | 5 % |
| Andrew Adams (D. C.) 36 Fed. 205..... | 33 1/4 % |
| Nellie Floyd (D. C.) 36 Fed. 221..... | 6 1/2 % |
| The Eleanor (D. C.) 42 Fed. 543..... | 5 % |
| Thos. B. Garland (D. C.) 83 Fed. 1018..... | 6 1/4 % |
| Agnes I. Grace (D. C.) 49 Fed. 662..... | 42 % |
| The Penobscot (D. C.) 103 Fed. 205..... | 9 % |
| Thos. L. James (D. C.) 115 Fed. 566..... | 25 % |

(129 Fed. 212.)

In re GOLDMAN.

In re GILBERT.

(Circuit Court of Appeals, Second Circuit. March 10, 1904.)

No. 188.

1. BANKRUPTCY—REOPENING ESTATE—DISCRETION OF COURT.

While a court of bankruptcy has power to reopen the estate of a bankrupt to permit the trustee to maintain an action to recover concealed assets, the granting of an application therefor rests in its discretion, and its action will not be reversed except for an abuse of discretion.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

J. C. Bushby, for petitioner.

Nathan D. Stern, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. We have no doubt of the power of the court to reopen the estate of the bankrupt or of the right of the trustee to maintain action necessary to recover concealed assets. But the motion was addressed to the sound discretion of the District Judge, and we are not satisfied that it was not properly exercised, in the interests of preventing litigation of insignificant importance. Had the application been made by the original creditors it would be regarded with more favor.

(129 Fed. 257.)

SIMPSON v. FIRST NAT. BANK OF DENVER.

FIRST NAT. BANK OF DENVER v. SIMPSON.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1904.)

Nos. 1,828, 1,829.

1. APPEAL—ASSIGNMENT OF ERRORS—FILING BEFORE ALLOWANCE OF APPEAL INDISPENSABLE.

The filing of an assignment of errors before or at the time of the allowance of an appeal is indispensable, under the eleventh rule of the Circuit Courts of Appeals (91 Fed. vi, 32 C. C. A. lxxxviii), and the appeal will be dismissed if the assignment is not thus filed.

2. SAME—CONDITIONAL ALLOWANCE.

An allowance of an appeal on condition that the petitioner give a bond in a fixed amount does not become an allowance of the appeal until the bond is given and accepted, and the filing of an assignment of errors before or at the time of the giving and acceptance of the bond is a filing within the time prescribed by the rule.

3. APPEAL MATTER OF RIGHT—ALLOWANCE OF WRIT OF ERROR MATTER FOR JUDICIAL DETERMINATION.

An appeal is a matter of right, secured by act of Congress upon compliance with the statutes relative to security and with the rules of the courts.

The allowance of a writ of error is a matter for judicial determination upon a consideration of the sufficiency of the grounds for the writ stated in the petition and assignment of errors.

The reason for the rule requiring the filing of an assignment of errors before the allowance of an appeal is to give notice to opposing counsel and the appellate court of the questions of law to be discussed. In an action at law there is the additional reason that the presentation of an assignment of errors to the judge who allows or issues a writ of error is essential to his decision of the question whether or not it should be issued.

4. EVIDENCE—ACCOUNT—EACH SIDE PRIMA FACIE EVIDENCE OF ITS CONTENTS.

The introduction in evidence without qualification of an account containing debit and credit items makes each side evidence of its contents.

In the absence of all other evidence, the debits and credits of such an account offset each other, and the account proves its balance only. An admission must be taken with its qualifications as an entirety.

But where there is other evidence the court or jury is not required to give equal credit to each side of the account, to the admissions against interest, and to the self-serving statements contained in it. They may, and they should, determine the fact for or against the evidence contained in the account as the preponderance of all the evidence in the case and the rules of law require.

(Syllabus by the Court.)

Appeals from the Circuit Court of the United States for the District of Colorado.

See 93 Fed. 309, 35 C. C. A. 306; 115 Fed. 1019, 52 C. C. A. 683.

Simon M. Simpson exhibited his bill against the First National Bank of Denver to procure an accounting from it of the proceeds of certain personal property, which he averred that he had pledged to the bank to secure his indebtedness to it. The bank denied that a portion of the goods were pledged, and alleged that its cashier had bought and paid for them. A decree to that effect was rendered in the court below, and this suit was dismissed. Upon an appeal to this court that decree was reversed, and the case was remanded to the court below, with directions to take an account of the proceeds of all the personal property which the complainant claimed to be pledged. That account

has been taken, and a decree has been rendered upon the accounting. Each of the parties to the suit has appealed from this decree.

T. J. O'Donnell, for plaintiff.

Charles J. Hughes, Jr. (Barnwell S. Stuart, on the brief), for defendant.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). The first question which the record in this case presents is whether or not the assignments of error were filed in such time that the merits of the case may be reviewed in this court. On June 23, 1902, each of the parties to this suit prayed in open court for an appeal from the decree, and orders were made that the appeal of the defendant was allowed, "but upon the condition, nevertheless, that the respondent give bond on such an appeal in the sum of fifty thousand dollars (\$50,000)," and that the appeal of the complainant was allowed, "but upon condition, nevertheless, that he give bond on said appeal in the sum of five hundred dollars (\$500)." On August 15, 1902, the defendant filed an assignment of errors, an approved bond in the sum of \$50,000, and a citation dated on that day. On August 20, 1902, the complainant filed an assignment of errors, an approved bond for \$500, and a citation dated on that day. The bonds were approved and the citations were signed by the judge who heard the case and made the conditional orders of allowance of the appeals. In this way the question is presented whether or not an assignment of errors is filed at or before the allowance of the appeal, within the meaning of rule 11 of this court (91 Fed. vi, 32 C. C. A. lxxxviii), when it is filed at the time when the judge signs the citation and approves the bond which he has made a condition of the allowance of the appeal.

The acts of Congress provide that "there shall be annexed to, and returned with any writ of error for the removal of a cause at the day and place therein mentioned an authenticated transcript of the record, an assignment of errors and a prayer for reversal with a citation to the adverse party," and that "appeals * * * shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error." Rev. St. §§ 997, 1012; 1 U. S. Comp. St. 1901, pp. 712, 716. Rule 11, so far as it is relevant to the question now under consideration, reads:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall specify separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed."

The acts of Congress did not require the filing of an assignment of errors before the allowance of a writ of error or of an appeal. This requirement rests upon rule 11 of this court, which is the same in terms and in effect as rule 34 of the Supreme Court of the United States. There are two reasons for this rule: One is that the judge to whom the application for the allowance or issue of a writ of error is presented may be informed what the alleged errors are upon which the petitioner

relies, so that he may intelligently decide the question whether or not the writ should be issued. The other is that opposing counsel and the appellate court may be informed by a statement which becomes a part of the record what questions of law are presented for their consideration and determination.

The first reason applies to the allowance of a writ of error only. It is inapplicable to the allowance of an appeal. The filing of the petition for a writ of error, with its accompanying assignment of errors, is the institution of a suit in the appellate court. The petition and the assignment set forth the grounds for the issue of the writ, and the duty of deciding whether or not these grounds are sufficient to warrant its issue, and of issuing or refusing to issue it in accordance with his decision of this question, is imposed upon the judge to whom they are presented.

It is not so in the case of an appeal. The right to appeal is an absolute right granted to the defeated party by the acts of Congress. No court or judge has any jurisdiction or power to condition the allowance of an appeal upon his consideration or determination of the question whether or not the applicant presents alleged errors which form reasonable grounds for the review of the decision below. That question is reserved for the consideration of the appellate court exclusively. The petitioner has the same right to the allowance of his appeal, in the absence of error or of the appearance of it, as when he presents the most conclusive reason for the belief that the decision against him was erroneous. The only question for the consideration of the court or of the judge to whom an application for an appeal is made is the sufficiency of the security offered for the costs and damages, or for the costs alone; and if the petitioner presents satisfactory security, and prays an appeal in accordance with the statute and the rules of the courts, the duty of the court or judge to whom he presents his application is imperative to allow it. *Brown v. McConnell*, 124 U. S. 489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495; *Pullman's Palace Car Co. v. Central Transp. Co.* (C. C.) 71 Fed. 809. The result is that the assignment of errors is not required to be filed before an allowance of appeal for the benefit or information of the court to whom the application for its allowance is made. The only reason for its filing at that time is that the alleged errors upon which the petitioner relies may be made a part of the record for the information of opposing counsel and of the appellate court; and that object is as well attained by filing it at any time before the security is approved and accepted as by filing it before the order is made which allows the appeal only upon the giving of the security.

Again, no formal order of allowance of an appeal is requisite to its perfection. The acceptance of security in open court at the same time at which the decree challenged is rendered, or the acceptance of security and the issue of a citation by the proper court or judge at any proper time or place within the period limited for an appeal, in themselves constitute its allowance, without any other or further order regarding the matter. *Sage v. Railroad Co.*, 96 U. S. 712, 715, 24 L. Ed. 641; *Draper v. Davis*, 102 U. S. 370, 371, 26 L. Ed. 121; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989; *National Bank v. Omaha*, 96 U. S. 737, 24 L. Ed. 881.

What, then, in the light of these principles and rules, was the legal effect of the orders of the court below, made on June 23, 1902, to the effect that the appeals of these parties should be allowed upon condition that they give bonds in the amounts there specified? That court had no jurisdiction or power to determine whether or not the appeals of these parties should be allowed if the applicants complied with the rules of the court and gave the security required by the acts of Congress. If they effected this compliance and the court accepted their security, its further order allowing or disallowing their appeals would be utterly futile. Their appeals would be as effective, upon their compliance with the rules and upon the acceptance of their security, if the court made an order that they were disallowed, as they would be if it made an order that they were allowed. The only judicial discretion and the only function of the court upon the application for the appeals was to determine the amount and sufficiency of the security which the parties were to present when they took them. This discretion it exercised. It fixed the amounts of the bonds, and it ordered that the appeals should be allowed upon the express condition that these bonds were given. If the bonds had not been given, that court would not have lost, and this court would not have gained, jurisdiction of this case. The appeals would not have been perfected, and the case would have remained in the Circuit Court. *Draper v. Davis*, 102 U. S. 370, 371, 26 L. Ed. 121; *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 35, 14 Sup. Ct. 4, 37 L. Ed. 986.

The legal effect of the conditional orders of allowance, therefore, was exactly the same that the effect of an order that the amounts of the bonds for appeals were fixed at \$50,000 for the defendant and \$500 for the plaintiff would have been. Under such an order the acceptance of the bonds and the issue of the citations would have allowed the appeals, without any order of allowance whatever. Under the conditional order actually made the acceptance of the bonds and the issue of the citations could have no other effect. These acts allowed the appeals, and our conclusion is that the appeals were not allowed until the bonds were accepted. The orders of allowance were expressly conditioned upon the giving of the bonds, and until they were given and accepted the appeals were not allowed, because, until then, the conditions of their allowance were not fulfilled. As the assignments of error were filed before or at the time of the acceptance of the security and the issue of the citations, they were filed within the time fixed by rule 11 of this court and the merits of the cases presented by the appeals are open for our consideration.

The cases of *Radford v. Folsom*, 123 U. S. 725, 727, 8 Sup. Ct. 334, 31 L. Ed. 292, *Brown v. McConnell*, 124 U. S. 489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495, and *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581, have been read and considered; but they do not appear to us to be inconsistent with the conclusion at which we have arrived. Neither of them presents a conditional order of allowance. It may be, as the Supreme Court held in *Radford v. Folsom*, that, where a bond is given and accepted under an order which absolutely allows an appeal and fixes the amount of the bond, that the appeal relates back to the date of the order of allowance, for the purpose of deter-

mining the term of the appellate court at which the case should be docketed. That question is not before us, and its decision either way does not determine the issue whether or not a conditional allowance becomes an absolute allowance before the condition is fulfilled. In *Brown v. McConnell* and *Hewitt v. Filbert* the Supreme Court in effect held that where an appeal is absolutely allowed and the case is docketed in that court, without the taking of security or without the issue and service of a requisite citation, that court has the power in its discretion to allow security to be given, or to issue a citation and permit it to be served, and then to proceed to hear the case upon the merits. But it is not perceived that these decisions answer the question whether or not an appeal, permitted only upon an express condition, is allowed before the condition is complied with. The opinions of this court have declared, and it is our purpose to adhere strictly to the rule which they announce, that rule 11 of this court is just and reasonable, that it will be enforced, and that under it we cannot consider or decide issues of law which are not raised by assignments of error filed before or when the writ of error or appeal is allowed. In actions at law the assignment of errors must be filed and presented to the judge before the writ of error is issued or allowed, because he must determine, from an examination of it and of the petition for the writ, whether or not they set forth any substantial grounds for the issue of the writ. *Frame v. Portland Gold Min. Co.*, 108 Fed. 750, 47 C. C. A. 664; *U. S. v. Goodrich*, 54 Fed. 21, 22, 4 C. C. A. 160; *Union Pac. R. Co. v. Colorado Eastern R. Co.*, 54 Fed. 22, 4 C. C. A. 161; *City of Lincoln v. Sun Vapor Street Light Co.*, 59 Fed. 756, 759, 8 C. C. A. 253, 256; *Flahrity v. Railroad Co.*, 56 Fed. 908, 6 C. C. A. 167; *Crabtree v. McCurtain*, 61 Fed. 808, 10 C. C. A. 86.

The rule applies with equal force to cases brought to this court by appeal. In *Webber et al. v. Mihills*, 124 Fed. 64, 59 C. C. A. 578, an appeal had been taken in a case in which the allowance was made on November 19, 1902, was absolute, and there was no claim or suggestion that it was not perfected on that day, so far as it could be completed without the filing of an assignment of errors. But the assignment was not filed until November 26, 1902. The appeal was dismissed because the assignment of errors was not filed before the appeal was allowed. The conclusion in the case at bar that the appeals here were not allowed until the conditions on which the court permitted them were fulfilled, and that the assignments of error were filed within that time, is consistent with the decision in the *Webber Case*. The opinion in *Lockman, Adm'r, v. Lang et al.* (filed November 30, 1903) 128 Fed. 279,¹ was rendered upon what was then supposed to be a state of facts similar to those presented in *Webber v. Mihills*, and the decision followed the conclusion in that case. A re-examination of the record in the *Lockman Case*, however, discloses the fact that the order of allowance of the appeal in that case contained a condition similar to those in the orders in the case at bar. The order of allowance was conditioned upon the giving of the bond for \$100, and when this bond was presented and accepted by the court a petition for a writ of error to which an assignment of errors was attached was filed with the trial court. A motion for a rehearing has been made in this court in that case, and the final decision of it

will be made to conform to the views which have been expressed in this opinion. We turn to the consideration of the merits of the case.

These are appeals from the decree of the Circuit Court upon the accounting directed by this court in *Simpson v. First National Bank*, 93 Fed. 309, 35 C. C. A. 306. In that case we found, from the evidence which had then been produced, that on March 2, 1887, Simpson owed the bank \$33,685.31, and that for the purpose of securing the payment of this indebtedness he conveyed and delivered to S. N. Wood, the cashier of the bank, and to H. Z. Salomon, its agent, his house and three lots in the city of Denver, which were worth about \$12,500, his stock of cigars, which was worth about \$21,000 and was called the "cigar store," and his bonded goods, which were worth about \$25,000, under an agreement with them that they should convert this property into money, pay the debt he owed to the bank, and return the surplus to him. The bank had admitted by its answer and testimony that Wood received the bonded goods for the purpose of securing the payment of \$23,000 of the debt of Simpson to the bank, but it had alleged and claimed that Wood bought the house and lots for \$7,500, which he applied in payment of Simpson's debt, and that he also purchased the cigar store for a like amount, which he also applied to the payment of the same debt and to the purchase of a certificate of deposit in the name of the president of the bank. The claims of the defendant that the transactions with Wood constituted a sale to him of the real estate and of the cigar store were not sustained by the proof; but as the complainant, Simpson, had not alleged that the real estate had been conveyed to secure his debt, and had not asked for an accounting of its proceeds, the conveyance of the house and lots to Wood and the reduction of the debt of Simpson by the application of the \$7,500, which the bank alleged that Wood had paid for this real estate, was allowed to stand as a sale, and the Circuit Court was directed to take and state an account of the proceeds received and of the expenditures made by the bank and by its agents, Wood and Salomon, in the management and disposition of the store and of the bonded goods. This account has been taken, and the court below has found, and rendered a decree to the effect, that the bank has received from these goods \$22,061.93 more than the sum of its expenditures and of the indebtedness of Simpson to it, and that the latter is entitled to recover this amount from the bank, with interest from January 19, 1893. Both parties have appealed from this decree. The alleged errors presented for our consideration by the bank will first be considered.

The cigar store was operated by Salomon from March 7 to March 25, 1887, when he sold it for cash and notes from which the bank realized \$19,541.66. Salomon then proceeded to sell many of the bonded goods, which had been at first delivered to Wood by Simpson, and he concluded his relations with this transaction during the last days of January, 1888. During this time the bank kept an account with him, styled "H. Z. Salomon Cigar Store Account," in which Salomon deposited the proceeds of the sale of the store and of the bonded goods which he handled, and out of which he drew various amounts by checks or orders upon the bank. During the same time Wood, the cashier of the bank, was expending money to pay duties and freight

upon the bonded goods, and was selling to others and was himself collecting the proceeds of some of these goods. The proceeds which he obtained from these sales to others than Salomon he deposited in his individual account with the bank. Out of this account he checked the amounts which he paid for duties, freight, and other expenses incurred in disposing of the bonded goods. These two accounts, and much testimony concerning many of the items which appear in them and concerning the amount and character of the goods in the store and in bond, were introduced in evidence at the first hearing for the purpose of proving that the cigar store was pledged, but was not sold. In this state of the case, and after the decision of this court, the Circuit Court on June 8, 1899, ordered the accounting. The seventy-ninth rule in equity requires parties accounting to bring in their respective accounts in the form of debtor and creditor, and provides that any of the other parties to the proceeding who are not satisfied with the account shall be at liberty to examine the accounting party in the master's office. The burden and duty was therefore upon the bank to bring in an account in the form of debtor and creditor, which would show upon its face the items which the bank claimed it had received and those which it claimed to have rightfully expended on account of the store and of the bonded goods, together with the respective dates at which it received and paid them out. On October 22, 1900, more than a year after the accounting had been ordered by the Circuit Court, the bank had presented no account whatever to the master. Thereupon counsel for Simpson submitted to the master the evidence that had been taken at the first hearing, and asked that the accounting might be had upon that record. On March 21, 1901, counsel for the bank submitted an account upon which two of the items credited to Simpson were: "Balance ret'd by S. N. Wood from cigar store, \$12,366.40. Collateral in hands of S. N. Wood sold, \$26,273.82."

The items from which these balances were derived were not specified in the account, but witnesses for the bank by their subsequent testimony identified them. This account disclosed a balance due from Simpson to the bank of \$9,813.17, and its witnesses testified that it was a correct statement compiled from its account books of all the moneys received and expended by it or by its agents on account of the store and the bonded goods. It had, however, stated in its original answer that Simpson owed the bank only \$2,742.98, upon the theory which it then maintained that the store was not pledged, but sold, and that he was entitled to a credit of only \$7,500 on account of the store, from which the bank actually received \$19,541.66. At a later period during the hearing before the master the bank filed another account, verified by the testimony of one of its witnesses, which shows Simpson in debt to the bank in the sum of \$42,466.67. This account contains an item of \$10,500 for goods placed in the cigar store and of \$22,230.86 interest, which appear here for the first time. Testimony was introduced which identified the items of receipts and expenditures on account of the pledged goods which passed through the individual account of Mr. Wood, and they stand in the master's report free from exceptions.

The first specification of error questions the action of the master and of the court below relative to the cigar store account. That account

practically balances. Some of the items which appear in it to the credit of the cigar store were explained and verified by testimony, and some were not. This is also true of the items charged against the cigar store in that account. The master, in making the statement of account upon which the decree below rests, charged the bank with the unexplained items on the credit side of that account, which amount to about \$23,000, on the ground that they were admissions of the bank against its interest; and he refused to credit it with the unexplained items on the debit side, which amount to about \$20,000. Upon this subject he said:

"By the decision of the Court of Appeals Mr. Salomon is held to be in this transaction the agent of the defendant, and this account must therefore be considered as the account of the bank; and the defendant must be charged with the entire amount of receipts as shown by the account, and can take credit only for such items of disbursement as are shown to be proper and necessary to the execution of the trust. There can be no reasonable doubt but a portion of the disbursements appearing on the account were expenses necessarily incurred in the transaction of the business, but they are not identified, nor the purpose of the expenditure shown."

This decision and action of the master was affirmed by the court below, and it is the subject of bitter complaint. The cigar store account was offered in evidence by the complainant upon the accounting as a part of all the evidence taken at the first hearing. It was a single account, composed of debit and credit items. There was testimony to the effect that Salomon deposited the proceeds of the pledged goods in the bank to the credit of the cigar store in this account, that he checked out of this account many thousand dollars to Wood, which the latter applied to pay the debt of Simpson, and that he used the moneys deposited in this account to run the business of the cigar store. This testimony was uncontradicted. This was an account between the bank and its agent, Salomon, and it was undoubtedly evidence that the bank received from Salomon, on account of the cigar store and on account of the bonded goods, the amounts which were credited to the store in that account, and that it paid out upon the orders or checks of its agent the amounts which are debited to the store therein. Where one introduces in evidence an admission, it must be taken in its entirety, with the qualifications which limit or destroy its effect. The whole admission, together with the limitations and qualifications it contains, must be taken together, because, unless these are all received, the true import and meaning of the admission may not be discovered, and the truth, which is the great object of the inquiry, may not be ascertained. But although the entire admission, including the parts favorable as well as the parts unfavorable to the party who makes it, must be received in evidence, they are not all necessarily equally conclusive or worthy of credit, and it is the province and the duty of the trier of the fact, in the light of all the evidence in the case, to determine how much of the entire statement he will believe and how much he will discredit. *Greenleaf*, Ev. § 201; *Bristol v. Warner*, 19 Conn. 7, 18; *Kallman v. His Creditors*, 39 La. Ann. 1089, 1090, 3 South. 382. This rule applies to statements of account which are introduced in evidence without qualification to secure the benefit of the admissions against interest which they contain. In the absence of all other evidence, each

side of such an account qualifies and limits the other. Both sides must be taken, weighed, and considered together. The items upon one side offset the items upon the other, and the account proves its balance only. *Morris v. Hurst*, Fed. Cas. No. 9,832; *Bell v. Davis*, Fed. Cas. No. 1,249.

But, where other evidence relative to the matters referred to in the account is presented for the consideration of the court or jury, they are not required to give equal effect to all parts of the account—to the admissions against interest and to the self-serving statements; but it is their province and their duty to consider each side of the account, together with all the other evidence germane to it, and to give to each part of it such credit as they believe it to be fairly entitled to receive. Neither side of the account in such a case is conclusive evidence of the facts which it discloses. The evidence presented by either side may be rebutted and overcome by testimony aliunde, and the triors of the fact may and should determine the question at issue for or against the evidence contained in the account as in their opinion the preponderance of all the evidence in the case and the rules of law require. 1 Jones on Law of Evidence, § 295; *Walden v. Sherburne*, 15 Johns. 409, 424; *Veiths v. Hagge*, 8 Iowa, 163, 174; *Gildersleeve v. Landon*, 73 N. Y. 609. The cigar store account, therefore, was *prima facie* evidence of the receipt by the bank, on account of the bonded goods and on account of the cigar store, of the items upon its credit side, and *prima facie* evidence of the payment by the bank, upon the same account, of the items on its debit side. But, as there was much other evidence upon this subject, it was not conclusive proof of either fact, and neither the master nor the court was required to give the same credence and effect to the self-serving statements on the debit side that they gave to the admissions against interest upon the credit side of the account. The effect of the application of this rule of law to the evidence in this case will be considered later in this opinion, after the effect of the other specifications of error which affect the master's statement has been determined.

The second specification of alleged error made by the bank is that the master and the court below found that the cigar store was sold for \$21,000, when the fact was that the selling price was only \$19,900. This specification is without foundation in fact, because the account of the master shows that the amount charged against the bank on account of this sale was only \$19,541.66. There was, however, an error in the charge, which the master made against the bank, of \$817.10 under date of March 25, 1887. This item was a check of S. N. Wood to Salomon, given to reimburse the latter for the payment of duties upon the bonded goods which he had made. This \$817.10 is credited to the bank by the master in the item of \$1,035.83 under the same date. The charge of the \$817.10 offsets the credit to that amount, and the effect of it is to deprive the bank of any credit for this amount of \$817.10, which it paid for duties on the goods. The debit side of the master's account should accordingly be reduced by the sum of \$817.10.

The next complaint is that the master and the court below refused to credit the bank with \$10,500 on account of imported cigars of that value, which the counsel for the bank insisted were placed in the cigar

store after it had been delivered to Salomon and just before he sold it. The bank also complains that the master refused, after the testimony was closed, to permit it to prove that these cigars were thus introduced into the store. The fact, if it be a fact, that these cigars were placed in the store, and the evidence offered to establish that fact, are alike immaterial, in the absence of any proof, and of any offer to prove, that these cigars were bought by, or were the property of, the bank. The decision of this court at the former hearing was that the cigar store and the bonded goods were the property of Simpson, and that the bank must account for their proceeds. If the bank, or its agent, Salomon, bought, paid for, and put into the cigar store, while it was in the hands of the latter, more cigars, the bank would undoubtedly be entitled to a credit for the amount which was realized from the sale of those cigars to Hyman, when it produced fair proof of the proportion of \$19,541.66 which was obtained at the sale that was realized from the cigars which it bought and placed in the store. The burden, however, would in any event be upon the bank to establish these facts, and in the absence of proof of them the complainant would be entitled to all the proceeds of the stock. If the bank had purchased and mingled its own cigars with Simpson's, it would have done so at its peril. In the case as it stands, the proof utterly fails to show that the cigars in question were ever the property of the bank or of Salomon, or that either of them ever bought or paid for them. There is neither proof nor offer of proof of these essential facts. The probability is that, if any cigars were ever added to the stock in the cigar store during the incumbency of Salomon, they were the cigars of Simpson which have not been otherwise accounted for by the bank, and there was no error in the refusal of the master to credit it with their supposed value, nor in his refusal to permit it to prove that such cigars were placed in the store, in the absence of evidence that they were the property of the bank, or the property of any other person than Simpson.

On November 6, 1888, Simpson indorsed and delivered to the bank the promissory note of the Only Chance Mining Company for \$5,000. At a later date such entries were made in the books of the bank as strongly indicate that the bank treated this note as paid by the surplus above \$7,500 which it received from the sale of the real estate it had obtained from Simpson. It is assigned as error that no credit was given to the bank for the amount of this note. As the complainant did not attack the sale of the real estate to Wood for the sum of \$7,500, and that transaction stands unimpeached, nothing was ever in fact paid upon this note, and credit for it should be given to the bank. The second note for \$5,000 made by the Only Chance Mining Company was not indorsed by Simpson, and for that reason it was properly omitted from the charges against him.

Other specifications of error are that the master and the court below refused to receive in evidence the bill of sale and other documents and testimony which tended to show that the transfer of the cigar store to Salomon was a sale, and not a pledge, and that they did not hold that inasmuch as the cigar store account appeared to balance, and Wood testified that in 1889 he delivered up to Salomon the Only Chance Mining Company's notes, a complete and conclusive settlement of the

transactions between Simpson and the bank was thereby effected. But there was neither error of law nor mistake of fact in these rulings. The second hearing below was not a new trial of the issues which were presented at the first hearing. It was not a rehearing of the questions whether the transaction between Simpson, the bank and Salomon was a sale or a pledge, and whether or not the accounts between them had been conclusively settled in 1888 or 1889. Those issues were tried and adjudicated by this court upon the appeal from the first decree. That adjudication was the law of the case, and the only questions open at the second hearing were those involving the state of the account between Simpson and the bank and its agents, Wood and Salomon, who took and held the cigar store and the bonded goods in trust to pay Simpson's debt to the bank and to return the surplus to him. The former adjudication determined the issue whether the accounts between these parties had ever been finally rendered and settled. No correct account had ever been rendered, because the bank had never given to Simpson credit for more than \$7,500, when he was entitled to credit for \$19,541.66 on account of the cigar store; and, even if the question were open for consideration, the evidence does not satisfactorily sustain the claim that any settlement was ever made between these parties, even upon the erroneous theory upon which the bank originally insisted.

We turn to the complaints of Simpson. He insists that the charge against him of \$2,000 for the services of Salomon in handling and selling the pledged goods is excessive, and that it ought not to be allowed to the credit of the bank. But Salomon took possession of, and with the aid of Simpson sold and collected the proceeds of, property of the value of more than \$50,000. He did this with the consent and pursuant to the agreement made by Simpson with the bank. For these services the bank has paid him \$2,000. The only question here is whether or not the services of Salomon were worth that amount. The master and the court below were competent, upon the disclosure of the facts that Salomon had rendered these services and that the bank had paid him for them, to determine their reasonable value, and their decision of this question should not be disturbed, in the absence of error of law or of mistake of fact. There is no evidence of either, and their finding upon this subject is affirmed.

The next complaint is that the bank was credited with the payment of \$2,000 for the services of its attorney in defending the title to the bonded goods against an action brought by one Muro, who claimed to be the owner of them. The evidence is conclusive that the action was brought, that the bank retained the attorney to defend it, that he did defend it, and that his services were worth \$2,000. The bank insists that on May 17, 1895, it paid the attorney this amount, and Simpson denies it. The evidence upon the question of payment is not very satisfactory: It is such that a finding either way could not be said to be without substantial support in the record. The master and the court below agree that the fee was paid, and that finding ought not to be disturbed, in view of the state of the evidence upon this issue, and of the fact that the issue involves nothing but interest upon the \$2,000. It involves interest upon the \$2,000 only, because, if the bank did not pay that amount to its attorney, the evidence conclusively shows that it

incurred the liability to pay it, and Simpson, who appeals to this court of equity for the proceeds of his property, ought, as a condition of the relief he seeks, to pay the liability of his pledgee necessarily incurred in defending the title to it. He who seeks equity should do equity.

The action brought by Muro was settled on January 19, 1893. But, according to the report of the master, there was in the coffers of the bank a surplus of the proceeds of the pledged property, after the payment of the debt of Simpson, at all times subsequent to the year 1887. It is assigned as error that in the statement of the account the bank is not charged with any interest upon this surplus from 1887 until the settlement of the Muro action on January 19, 1893. This balance, however, was derived from the sale of the goods to a large part of which Muro claimed the title. If he had succeeded in his action, the bank would have been required to pay to him the value of these pledged goods. It would have been relieved from paying their proceeds to Simpson. It would have been entitled to apply those proceeds to satisfy the claim of Muro. It was the surplus which the bank should receive after properly administering the trust, after defending the title to the pledged goods, and after paying the debt of Simpson, and that surplus only, which the latter was entitled to receive from the bank. It was impossible to determine whether or not there would be any surplus, and, if there should be, how much that surplus would amount to, until the action which Muro had brought was determined. Until that time nothing became due from the bank to Simpson, no action to recover the surplus could be maintained, and consequently no liability to pay interest upon the amount which the bank held in trust and had the right to retain, at least for a reasonable time, in order to dispose of the litigation against it, arose. The specifications of error regarding the interest cannot be sustained.

Reference has been made to all the specifications of error, and the result is that if the unexplained items on the debit side of the cigar store account should be disallowed, as they were by the master and the court below, the \$22,061.93 which was found by them to be due from the bank to Simpson should be reduced by the deduction of \$5,817.10 to \$16,243.83 and interest from January 19, 1893. If, on the other hand, those unexplained items should be allowed and credited to the bank, a decree should be rendered in favor of the bank and against Simpson, because the aggregate of these items exceeds \$16,243.83 by several thousand dollars. We return to the consideration of this, the most important question in this case.

The cigar store account was introduced before the master as a part of the evidence at the first hearing, from all of which this court deduced the finding that on March 2, 1887, Simpson owed the bank \$33,-685.31, that he paid it \$7,500 by the conveyance of his residence, and pledged to it to secure the remainder of his indebtedness bonded goods of the value of about \$25,000 and a cigar store of the value of about \$21,000, leaving the bank indebted to him on the face of this finding in the sum of about \$19,814.69. 93 Fed. 310. The evidence at the former hearing, in other words, so strongly indicated that there was some amount of money due to Simpson on account of the pledged goods that in the opinion of this court it overcame the evidence of the

debit side of the cigar store account, and induced a finding to the effect which has been stated. It necessarily follows that when the counsel for the appellee, Simpson, introduced before the master all the evidence at the former hearing, he made a *prima facie* case to the effect that his client was entitled to recover about \$19,000 from the bank, and the burden was placed upon the appellant bank to overcome this conclusion by means of the accounting. Does all the evidence, when fairly considered, establish the fact that the bank was not justly liable to pay to the complainant an amount approximating this sum? The case imposes upon the court the duty of answering this question, and it has been a difficult task to do so satisfactorily. The evidence is not so clear that it is possible to state an account with the certainty that every item in it is correct. If, however, when all the evidence is taken together, it indicates with reasonable certainty what the general balance of the account between these parties must have been on January 19, 1893, the court is not relieved of the duty of finding this amount and rendering a decree accordingly by minor doubts and uncertainties which the record leaves undetermined. If there was any probability that more or better evidence could be produced, the case might be returned to the master for farther testimony; but the witnesses have generally testified that they have now presented all the evidence under their control. Salomon, the chief actor in the drama, is dead. His books and vouchers have been destroyed, and there is no hope of a more satisfactory record from a prolongation of this litigation. This suit has been pending for more than a decade. Its continuance would serve only to deprive the ultimate victor of the benefit of the decree, and to inflict unnecessary loss upon the defeated. In view of these facts, all the testimony, including especially both sides of the cigar store account, has been carefully read and thoughtfully considered. Much of the evidence has been read many times, and an earnest effort has been made to justly determine the main issue remaining in this case—the issue whether the bank is justly indebted to Simpson for an amount approximating \$16,000, or Simpson is indebted to the bank, as claimed by counsel for the latter, for tens of thousands of dollars. The established facts which persuade to the conclusion that has finally been reached upon this question will be briefly stated. No attempt will be made, however, to itemize the amounts to be mentioned, or to make them exact, because the significance of the facts is not in the specific amounts with which they deal, but in their general character and effect.

Conceding to the debit side of the cigar store account its effect as *prima facie* evidence, the case before the master opened, as we have seen, with that evidence rebutted and a *prima facie* case against the bank established for the recovery of about \$19,000, based upon all of the evidence at the first hearing and the finding of this court thereon. When the subsequent evidence upon the accounting had been introduced, the fact was established, by the cigar store account and by the testimony of Simpson and Wood, that Salomon received from the pledged goods and deposited with the bank in that account about \$55,000, and that out of this account he paid to Wood amounts which aggregated \$24,766.40 to pay the debt of Simpson, \$7,543 to pay a note which Salomon gave to the bank when he took the cigar store, and \$2,000 to Salomon

for his services in handling the pledged goods, leaving a balance of about \$20,000, which the debit side of that account shows that Salomon had checked out for other purposes which are not established or indicated by the record. Now, the only other purpose to which this \$20,000 could have been legitimately applied was to pay the necessary expenses of operating the store, which had a stock of about \$20,000, for 23 days, and the reasonable expenses of selling the bonded goods, which were worth about \$35,000. The fact that Salomon checked this amount of about \$20,000 out of the bank through his cigar store account, and that it was charged to him in that account, does not seem to us to be convincing evidence that it was either reasonable, just, or necessary to expend so large an amount to dispose of property which realized only about \$55,000. It is true that in the foregoing statement of the account, which finds the amount realized by Salomon from the goods he sold to be \$55,000, the cigar store account and the testimony of Simpson that Salomon deposited the proceeds of his goods in that account, and that as the money accumulated he gave checks to Wood to apply on Simpson's debt and to run the business, has been esteemed sufficient proof, in the light of the other evidence in the case, that the unexplained items on the credit side of this account, which amount to about \$23,000, represent proceeds of the pledged goods received by the bank from Salomon, while the debit side of that account is not given sufficient probative force to establish the proper expenditure of the unexplained items on that side of the account, which amount to about \$20,000. But there are substantial reasons for this conclusion, derived from the relations of the parties and the other evidence in the record. The bank held these goods in trust as pledgee. It had the control of the goods, of its agent, Salomon, of the account of the sales, and of the expenditure of the moneys derived from them. Simpson had none of these things. He participated in, perhaps conducted, the negotiations for the sale of the goods under the supervision of Salomon; but he had no control of the account or of the moneys deposited in the bank. It was the duty of the bank to keep a correct account of the receipts from the proceeds of the trust estate, of the necessary expenses of selling it, to render this account to Simpson, and to pay to him the surplus remaining after his debt and the necessary expenses of turning the pledged goods into money had been paid. It kept an account with its agent, Salomon, but none with Simpson or with the trust estate. The credit side of this account is an admission against interest, while the debit side is a self-serving statement, and in the presence of other persuasive evidence upon this subject the former naturally induces more credence than the latter.

Again, this was not an account between a creditor and his debtor. In such an account the debtor himself generally orders the payment of, or receives, the items charged to him, and, if they are erroneous, he has the knowledge and the testimony to disprove them. It is not so in this cigar store account. This was an account between the bank, a trustee, and its agent, Salomon. So far as this record discloses Simpson had no knowledge, nor means of knowledge, of the purposes for which the \$20,000 here in question was expended, or of the items through which it was drawn from the bank, while the latter, after the

money was deposited with it, had the power and was charged with the duty to see and to know how this fund was used.

Again, this account was written by the bank, if the testimony of its officers was true, at a time when they were acting upon the theory that Salomon owned the cigar store, and had the right to use its proceeds for his own benefit, or otherwise, as he saw fit. It may, therefore, well be convincing evidence that the unexplained items on its credit side were derived from the pledged goods and were deposited with the bank. But how can it be very persuasive evidence of the just application of \$20,000 of these trust funds which are included in the unexplained items on its debit side?

There is another class of evidence in this case which strongly confirms the conclusion that the unexplained items on the credit side of the cigar store account represent the proceeds of the pledged goods, while those on the debit side do not represent a proper application of those proceeds to the discharge of the trust. It is the evidence of the action of the bank before this controversy had arisen. Neither the account of Wood nor the cigar store account shows any surplus or balance due to Simpson. The action of the bank demonstrates the fact that there was such a surplus. While in 1887 it was treating the transfer of the cigar store to Salomon as a sale, and was giving Simpson credit for only \$7,500 on account of it, instead of allowing him a credit for its proceeds, \$19,541.66, it nevertheless acknowledged full payment of Simpson's debt from the proceeds of the pledged goods on October 5, 1887. If upon that theory the debt was paid on that day, Simpson is now entitled to recover of the bank at least—

| | |
|---|-------------|
| The amount of the certificate of deposit to Moffat, which he had bought with his property, and which the bank was holding for him | \$ 4,314 69 |
| The difference between the \$7,500 the bank had credited him for the cigar store and \$19,541.66, its proceeds..... | 12,041 66 |
| The amount deposited in the cigar store account after October 5, 1887 | 5,683 99 |
| | <hr/> |
| | \$22,040 34 |
| Less the amount paid Salomon for his services..... | \$2,000 00 |
| The amount paid for the settlement of the Muro action and for the attorney's fees therein..... | 4,230 00 |
| And the amount of the Only Chance note..... | 5,000 00 |
| | <hr/> |
| Making in all..... | \$11,230 00 |
| And leaving a surplus due him of..... | \$10,810 34 |

These considerations have forced our minds to the conclusion that the evidence clearly establishes the fact that the bank received about \$55,000 from the proceeds of the pledged goods which were handled by Salomon. The receipt of this money by the bank charged it with a trust in favor of Simpson, and made the bank liable to him for every dollar of it which it did not lawfully expend in discharging its trust. Concede that the cigar store account is evidence that the bank paid out the \$20,000 evidenced by the unexplained items on the debit side of the account upon the checks of Salomon. That fact is not enough to exonerate it. It must go farther and establish the fact that it paid this sum out either in satisfaction of the debt of Simpson to it or in dis-

charge of the necessary expenses of converting the pledged goods into money. The proof is plenary that Simpson's debt and Salomon's note and Salomon's services were paid with about \$35,000 of this fund. But there is no evidence to show what was done with the other \$20,000. The duties upon the goods, the freight, the insurance, the taxes upon them were paid by Wood and are credited to the bank in the master's account. If other duties, other freight, other taxes, other insurance, had been paid, the proof of it would doubtless have been forthcoming; for it would not have been difficult to obtain, and the witnesses for the bank have testified that they have produced all the evidence they could secure. There is nothing left to which this \$20,000 could have been lawfully applied but the expenses of conducting this business, and it is too tense a strain on our credulity to believe that it was necessary to expend \$20,000 to pay the expenses of converting cigars and tobacco worth only about \$55,000 into money. The facts to which reference has now been made converge with compelling force to show that there was a substantial surplus of many thousand dollars remaining in the hands of the bank and of its agents after the debts of Simpson and all the legitimate charges against the proceeds of the pledged goods had been satisfied. While they do not disclose the exact amount of this balance, they indicate that it could not have been very far from the \$16,243.83 to which the award of the master has been reduced by the specific exceptions which have been considered, and they leave little doubt that a reversal of that award and a finding of an indebtedness of Simpson to the bank would work substantial injustice.

In reaching this conclusion the books and accounts of the bank and the testimony of its officers and witnesses have not been disregarded, but they fail to convince that the bank has fairly accounted for the proceeds of this trust estate which the proof, in our opinion, shows that it received. In the first place, the account books of the bank were not written to show, but to conceal, the truth of this transaction. They did not disclose the fact that the deposit certificate to the president of the bank for \$4,314.69 was the property of Simpson. They were not written to indicate, but to conceal, the fact that the cigar store was pledged to secure the debt of Simpson. The bank never made or kept any separate account of the receipts and expenditures on account of the pledged goods, as it was its legal duty to do. It mingled the amounts which Wood obtained from them with his individual funds, and permitted him to make his expenditures on account of them by means of checks on his own account, paid indiscriminately with those he drew to discharge his individual business obligations, so that there was no way to trace his receipts and expenditures on account of the trust estate, except by means of a tedious search for the items through his individual account, with the aid of his recollection and his vouchers. Even this account with Wood was not regularly kept, by entering all the items in it at the respective times at which the transactions to which they relate occurred. It contains a single credit on October 4, 1887, of three items; one of \$5,117.30, March 25; one of \$10,000, May 13; and one of \$5,000 August 4, making in the aggregate \$20,117.30. There were other errors in the books of the bank—one of \$10,000 in Wood's account, one of \$100.92, under date of December 15, 1887, in

the cigar store account, and one of seven items which made a difference of \$4,604.95 in the profit and loss account. The entries in the latter account regarding the transaction in question in this suit, and the entries of certain notes on the discount ledger relating to Simpson's account, were written over erasures of entries that it was impossible to read. The officers and witnesses of the bank were unable themselves to make a true statement of the account between it and Simpson from their books and vouchers. Their knowledge and testimony concerning this subject have been neither uniform nor consistent. When they examined their books and made their answer, they stated an account on the theory that the cigar store was sold by Simpson to Wood for \$7,500. They gave Simpson credit on account of it for that amount only, and then showed a balance due to the bank of only \$2,742.98. They had not then discovered apparently that they held a deposit certificate in the name of their president for \$4,314.69, which, upon the theory of that account, had been purchased with the money of Simpson, and that he was entitled to additional credits of this \$4,314.69 and of \$12,041.66, the difference between the \$7,500 which they had credited him for the cigar store and the \$19,541.66 which that store produced. After the decision of this court and the order for the accounting they stated another account, which disclosed a balance of \$9,813.17 against Simpson, and before the testimony in the presence of the master was closed they presented a third account, in which the balance against Simpson appears to be \$42,466.67. The last account includes items of \$10,500 for cigars taken from the warehouse and put into the cigar store, and \$22,230 for interest, which there first appear. One or more of the officers or witnesses for the bank testified that each of these three accounts was correct according to the books of the bank and according to the knowledge which the officers or witnesses had of the transactions. But the three accounts and the testimony in support of them demonstrate the fact that some of them must have been erroneous. There is nothing in all this evidence for the bank, including the debit side of the cigar store account, of sufficient weight and cogency to overcome the broad, controlling fact which the evidence establishes and which conditions the entire case—the fact that the bank has received from the pledged goods many thousand dollars for which it has not in any way accounted, save by the entries in the debit side of the cigar store account of unexplained items to the amount of about \$20,000. There is no legitimate cause to which the expenditure of these items can be attributed under the evidence, except the expenses of operating the store for 23 days, such as rent and clerk hire, and the expenses of selling the bonded goods. The debit side of this account may be evidence of a reasonable expenditure for this purpose. Such a reasonable expenditure may have amounted to \$1,000. An expenditure of this character of some amount must have been made. The probative force of the unexplained items in the debit side of the cigar store account cannot and ought not to be extended beyond this reasonable expenditure, in the absence of evidence of the exact amount paid out on this account, and this item of expenditure is accordingly fixed and allowed to the bank at the sum of \$1,000. The record as it stands contains no evidence that will sustain a finding that it was either necessary, just, or right for the bank or its agents to ex-

pend more than this amount in the execution of its trust, in addition to the amounts heretofore credited to it, while it is convincing to the effect that the bank held all the amounts which it received from the pledged goods, above the sums it expended to administer the trust and to pay the debts of Simpson, charged with an express trust for the benefit of the complainant. The amount thus received by the bank above the expenses of the administration of the trust and the debts of Simpson is, therefore, found to be \$15,243.83.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to enter a decree in favor of the complainant, Simpson, and against the bank, for the sum of \$15,243.83, with interest thereon at 8 per cent. per annum from January 19, 1893, and his costs to the time of these appeals. The bank may recover the costs of these appeals in this court.

(129 Fed. 274.)

HEINZE et al. v. BUTTE & B. CONSOL. MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. March 4, 1904.)

No. 1,033.

1. CONTEMPT—NATURE OF PROCEEDING—REVIEW.

A bill in equity, filed in aid of an action at law to recover for trespasses on a mining claim, alleged that defendants had extended their underground workings from adjoining claims owned by them into the claim of complainant, and prayed for an injunction restraining them from extracting and removing ore therefrom. The answer justified the trespasses on the ground that the veins or lodes into which defendants' workings were extended had their apexes in defendants' claims, and were their property. A preliminary injunction was granted, and, on petition of complainant, an order was entered requiring defendants to permit agents of complainant to enter their workings, and examine, inspect, and survey the same so far as necessary to obtain evidence on the issue joined. Defendants having refused to permit such inspection and survey, an order was entered finding them in contempt of court, and adjudging a fine against them; such order, however, to be discharged, as to both fine and commitment, on their compliance with the previous order. *Held*, that such order of contempt was not a judgment in a criminal, but in a civil, proceeding; that it was remedial and coercive in character, and entered for the purpose of enforcing private rights of complainant, judicially determined, and was not reviewable by writ of error.

2. SAME—PERSONS BOUND BY ORDERS OF COURT—OFFICERS OF CORPORATION DEFENDANT.

Officers of a mining corporation which is a party to a suit in equity in which it has been ordered to permit an inspection and survey of its mine are bound by such order, although not personally parties to the suit, and may be subjected to punishment for contempt, where, having the power to require compliance with it by the company, they refuse to do so.

3. INTERLOCUTORY ORDERS—PERSONS BOUND—PURCHASER PENDENTE LITE.

A purchaser of mining property, including the shafts, machinery, and workings thereon, pending a suit against the grantor involving the alleged extension of such workings into adjoining property, is bound by an order subsequently made by the court in such suit permitting the adverse party to inspect and survey the mine.

In Error to the Circuit Court of the United States for the District of Montana.

This is a writ of error, directed to the Circuit Court for the District of Montana, to review an order of that court adjudging F. Augustus Heinze,

Josiah H. Trerise, and Alfred Frank guilty of contempt of court, in violating an order of the court permitting the inspection and survey of certain premises mentioned and described in the order.

On May 17, 1898, the defendant in error filed a bill in equity in the Circuit Court for the District of Montana against the Montana Ore Purchasing Company, Chilli Gold Mining Company, John MacGinnis, Edward L. Whitmore, and Carlos Warfield, as defendants, to enjoin and restrain the defendants from extracting and removing certain ores and minerals from out of the Michael Devitt claim, of which complainant claimed to be the owner. The suit was ancillary to an action at law brought by the same complainant, as plaintiff, against the same parties, as defendants, to recover damages for the same trespasses. Upon the bill, process was issued, and the defendants appeared and answered. The Montana Ore Purchasing Company, in its answer, justified the trespasses charged in the bill of complaint by virtue of its claim of ownership of the Rarus and Johnstown lode claims, lying northerly of and adjacent to the Michael Devitt claim. It was alleged that these claims were patented by the United States; that they had parallel end lines; that certain veins or lodes which had their tops or apexes within the said Rarus and Johnstown lode claims extended on their strike through said lode claims nearly parallel to the side lines of said claims, and departed through the end lines thereof; that these veins or lodes on their downward course or dip so far departed from a perpendicular as to pass beyond the vertical side lines of said lodes or claims, and to enter the ground described in the complaint as the Michael Devitt lode claim; that the Montana Ore Purchasing Company was the owner of said veins or lodes which had their tops or apexes within the Rarus and Johnstown claims, and all ores, minerals, and metals therein contained, throughout their entire depth; that any entry which had been made by the defendant or its lessee, the Chilli Gold Mining Company, within the vertical side lines of the Michael Devitt claim mentioned in the complaint, had been upon such veins or lodes, and that any ores, minerals, or metals which had been extracted from within said vertical side lines had been taken and extracted from said vein or lode; and that the same was the property of the defendant or its lessee. The answer of the defendant the Chilli Gold Mining Company pleaded substantially the same justification, under the lease from the Montana Ore Purchasing Company. The answer of the defendants MacGinnis, Whitmore, and Warfield justified as officers or agents of the Chilli Gold Mining Company.

Upon the bill an injunction pendente lite was issued in accordance with the prayer of the bill, and served upon F. Augustus Heinze, as president of the Montana Ore Purchasing Company, Edward L. Whitmore, a trustee and general manager of the Chilli Gold Mining Company, and upon each of the other defendants named in the bill of complaint. This injunction is still in force.

On October 1, 1903, the complainant in the action presented a petition to the Circuit Court, showing that the defendants had constructed certain shafts upon the Rarus and Johnstown claims, and from said shafts had made a large number of underground workings, extending through the said Johnstown and Rarus claims into and beneath the surface of the Michael Devitt claim, and also had extended and made a large number of workings from the said shafts south into the claim called the "Pennsylvania Claim," which joins the said Michael Devitt claim on the west, and from the said Pennsylvania claim into and beneath the surface of the Michael Devitt claim; that, in order that the complainant might be prepared to prove its contention in the case, and prove that it was the owner of the ore bodies in controversy, and also prove a violation of the injunction by the defendants, it was necessary that the complainant, by its representative, should make a survey, inspection, and examination of certain portions of the Rarus and Johnstown claims, and underground workings therein, and underground workings made from the shaft and working of said claims, and from and through the Pennsylvania claim into and beneath the surface of the Michael Devitt claim, and all workings made from any of said claims under the surface of the Michael Devitt claim. To this petition the Montana Ore Purchasing Company filed its answer on October 13, 1903, in which it denied the several allegations contained in the petition; denied that it had possession and control of any of the shafts or portions of the Johnstown and Rarus claims lying north of the Michael Devitt claim,

or extending into the Michael Devitt claim; and denied that it was necessary for the complainant to have the survey, examination, or inspection of the workings in the Rarus, Johnstown, or Pennsylvania claims for the purpose of the trial, or for any matter connected therewith.

On October 14, 1903, upon the petition and upon the motion of the complainant, an order of inspection, examination, and survey was entered in the Circuit Court, appointing certain persons as agents and representatives of the complainant during a period of 15 days, to survey, examine, and inspect the Michael Devitt, Rarus, Johnstown, and Pennsylvania lode claims, and all the underground workings and openings in said claims, so far as was necessary to enable complainant to ascertain whether the said underground workings and openings in the Rarus, Johnstown, or Pennsylvania connected with the underground workings in the Michael Devitt lode claim. It was further ordered that for the purpose of such inspection, examination, and survey, the agents and representatives of the complainant were authorized to temporarily remove or open all doors, bulkheads, or other obstructions which might be found in said premises, or any part thereof, and which might interfere with or obstruct such examination, inspection, and survey, provided that at or before the completion of such inspection, examination, and survey, the complainant should replace all such bulkheads, doors, or other obstructions so removed, and leave the premises in the same condition as found, so far as practicable. The defendants were required to hoist and lower complainant's representatives through the shafts on the Rarus and Johnstown lode claims in the control of the defendants, and furnish to the representatives of the complainant ingress to and egress from the said premises and the said workings at all reasonable times during the period of 15 days.

The defendants thereupon appealed from said order to this court, and petitioned this court for a writ of supersedeas. This petition was denied, the court holding that the order appealed from was in no sense final, and therefore not appealable. 126 Fed. 168. The defendants thereupon presented to this court a petition for a writ of certiorari to review the action of the Circuit Court in making the order of October 14, 1903. This petition was denied; the court holding that, having determined that the order was not appealable, the court had no power to issue the writ of certiorari. 126 Fed. 169. Thereafter another petition for writ of certiorari was filed in this court by the Johnstown Mining Company to review the same order. This petition alleged that it was not a party to the action in the Circuit Court, but, it appearing that the petitioner had acquired its title to a portion of the ground involved in the inspection order from the Montana Ore Purchasing Company during the pendency of the cause, and after the issues were joined in the same, this petition was also denied.

Pending these proceedings the order of the Circuit Court of October 14, 1903, was not enforced, and on November 3, 1903, the period for the inspection, examination, and survey mentioned in the order was extended by the court for a period of 21 days from November 4, 1903. Upon an attempt being made upon several days from November 4 to November 16, 1903, to execute and enforce the order, its execution is charged to have been impeded and obstructed by F. Augustus Heinze, Josiah H. Trerise, and Alfred Frank. The charge being brought to the attention of the Circuit Court by affidavit, that court issued an order, directed to Heinze, Trerise, and Frank, to show cause why they, and each of them, should not be committed for contempt in refusing to permit the inspection, examination, and survey as directed by the court. In response to this order, the parties named appeared, and severally pleaded "Not guilty." The court thereupon heard testimony upon said charge, and rendered its judgment on December 19, 1903, to the effect that the persons charged, to wit, F. Augustus Heinze, Josiah H. Trerise, and Alfred Frank, were each and all guilty of contempt of court in violating, obstructing, and refusing to obey the order of the court; that the acts of contempt were committed after notice and full knowledge of the issuance of the said order. From this order a writ of error was allowed, and on the 21st day of December, 1903, a bond on the writ of error for costs in the sum of \$300 was accepted and approved by the judge holding the Circuit Court, but the judge refused to take a supersedeas bond to stay the judgment of the court in the contempt proceedings. Thereupon application was made to the writer of this opinion, as a judge of

the Circuit Court of Appeals, to take a supersedeas bond and direct the clerk of the Circuit Court of Appeals to issue a writ of supersedeas to the court below, staying the execution of the judgment of the court. The supersedeas bond was taken, and a writ of supersedeas issued accordingly.

Garret W. McEnerney, James M. Denny, and John J. McHatton, for plaintiffs in error Heinze and Trerise.

Robert B. Smith, for plaintiff in error Alfred Frank.

John F. Forbis, Crittenden Thornton, and J. F. Riley, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The defendant in error has moved to dismiss the writ of error on the ground that this court has no jurisdiction to review the judgment of the Circuit Court in this case. At common law the exercise by a court of competent jurisdiction of the power to punish for contempt could not be reviewed. 9 Cyc. 61. "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Ex parte Robinson*, 19 Wall. 505, 506, 22 L. Ed. 205.

The appellate jurisdiction of the Circuit Court of Appeals to review by appeal or writ of error final decisions in the District Court and the existing Circuit Courts is provided in section 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, 828 [U. S. Comp. St. 1901, pp. 547, 549]. It is there provided that this jurisdiction shall be exercised in all cases other than those provided for in the preceding section of the act, unless otherwise provided by law. The cases provided for in the preceding section of the act relate to appeals and writs of error from the District and Circuit Courts direct to the Supreme Court, and do not include final decisions in the District and Circuit Courts in contempt proceedings. The primary object of the act of March 3, 1891, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve the Supreme Court of the overburden of cases and controversies arising from the rapid growth of the country and the steady increase of litigation, and, for the accomplishment of this object, to transfer a large part of the appellate jurisdiction of the Supreme Court to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between the Supreme Court and the Circuit Courts of Appeals, according to the scheme of the act, the entire appellate jurisdiction from the Circuit and District Courts of the United States. *American Construction Co. v. Jacksonville Ry. Co.*, 148 U. S. 372, 382, 13 Sup. Ct. 758, 37 L. Ed. 486; *United States v. American Bell Tel. Co.*, 159 U. S. 548, 551, 16 Sup. Ct. 69, 40 L. Ed. 255. Prior to this act the general appellate jurisdiction of the Supreme Court in civil cases was provided for in the several acts of Congress incorporated into sections 691, 692, and 693 of the Revised Statutes, and the authority to decide questions occurring on the hearing or trial of any criminal proceeding before a Circuit

Court, upon which the judges were divided in opinion, was provided for in section 697 of the Revised Statutes. Neither of these sections provided in express terms for the review of judgments in contempt proceedings, but very early in the judicial history of the Supreme Court the question arose whether the court had authority to review the judgments of the Circuit Courts in such proceedings. The first case in which this question was considered was *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391. In that case a petition was presented to the Supreme Court for a writ of habeas corpus to bring up the body of Kearney, who was in prison under a commitment of the Circuit Court for an alleged contempt. The petitioner was a witness under examination in the Circuit Court, and had refused to answer a question put to him, on the ground that the answer might tend to criminate him as a *particeps criminis*. The objection was overruled, and, he having persisted in his refusal to answer the question, he was committed to jail for contempt. It was contended, in opposition to the petition for writ of habeas corpus, that the Supreme Court had no appellate jurisdiction in criminal cases, and that it could only revise the decisions of the Circuit Court in cases where there was a certificate of a division of opinion of the judges below. The writ was denied. Mr. Justice Story, in delivering the opinion of the court, said:

"It is to be considered that this court has no appellate jurisdiction confided to it in criminal cases by the laws of the United States. It cannot entertain a writ of error to revise the judgment of the Circuit Court in any case where a party has been convicted of a public offense. And undoubtedly the denial of this authority proceeded upon great principles of public policy and convenience. If every party had a right to bring before this court every case in which judgment had passed against him for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases totally frustrated. If, then, this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly? It is also to be observed that there is no question here but that this commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. The only objection is, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case, it is by a revision of the opinion of the court, given in the course of a criminal trial, and thus asserting a right to control its proceedings and take from them the conclusive effect which the law intended to give them. If this were an application for a habeas corpus after judgment on an indictment for an offense within the jurisdiction of the Circuit Court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside and discharge the prisoner. There is, in principle, no distinction between that case and the present, for, when a court commit a party for contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled, upon full deliberation, in the case of *Brass Crosby*, Lord Mayor of London, 3 Wilson, 188."

In the case of *New Orleans v. Steamship Company*, 20 Wall. 387, 392, 22 L. Ed. 354, the Circuit Court of the United States for the District of Louisiana had obtained jurisdiction of a controversy between the steamship company and the authorities of the city of New Orleans concerning a lease of certain water-front property by the steamship company. An injunction had been issued by the Circuit Court, restraining the city authorities from interfering with the possession of the property as held by the steamship company. The city surveyor,

aided by a number of laborers, acting under an order of the city council approved by the mayor, destroyed the fence or inclosure erected by the company around the leased premises; and thereupon the mayor of the city applied to a city court for an injunction to restrain the company from rebuilding the inclosure which had been destroyed, and an injunction was granted by the city court accordingly. The company thereupon obtained a rule in the Circuit Court requiring the mayor to show cause why he should not be punished for contempt in taking such action in another tribunal. At the hearing the court decreed that the mayor should pay a fine of \$300 for the contempt of court wherewith he was charged; that the city should be enjoined from interfering with the possession and infringement of the demised premises by the company during the life of the lease, and that the company should recover from the city \$8,000 for damages; and that the city should pay the costs of the suit. From the decree in the case an appeal was taken to the Supreme Court of the United States, where the decree or judgment was affirmed. Speaking of the fine imposed upon the mayor, the court said:

"The fine of three hundred dollars imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion. In *Crosby's Case*, Mr. Justice Blackstone said: 'The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interfering to each respective court.' "

In the case of *In re Chiles*, 22 Wall. 157, 22 L. Ed. 819, the state of Texas applied to the Supreme Court for a rule on John Chiles to show cause why he should not be dealt with as guilty of a contempt of that court, in disobeying one of its decrees. The decree alleged to have been disobeyed by Chiles is found in *Texas v. White*, 7 Wall. 700, 742, 19 L. Ed. 227, and had relation to the title to certain bonds of the United States issued to the state of Texas. The suit was an original suit in the Supreme Court, in which the state of Texas, claiming the bonds as her property, prayed for an injunction to restrain the defendants *White* and *Chiles* from receiving payment from the national government, and to compel the surrender of the bonds to the state. The defendants filed separate answers. Notwithstanding the decree, *Chiles* continued to claim title to the bonds under a transaction not set up in his answer to the suit. The court held that he was not the less concluded and bound to obey the injunction; that notwithstanding the fact that, in the answer to the order to show cause, *Chiles* asserted a different title or source of title from the one imputed to him in the suit, and defended by him, he was in contempt of court in setting up and seeking to enforce his claim. He was found guilty of contempt, the court holding that punishments for contempt of court had two aspects, namely: (1) To vindicate the dignity of the court from disrespect shown to it or its orders; (2) to compel the performance of some order or decree of the court which it is in the power of the party to perform, and which he refuses to obey.

The next case is that of *Hayes v. Fischer*, 102 U. S. 121, 26 L. Ed.

95. The facts of the case are stated in the opinion of the court by Mr. Chief Justice Waite as follows:

"Fischer, the defendant in error, brought a suit in equity in the Circuit Court of the United States for the Southern District of New York to restrain Hayes, the plaintiff in error, from using a certain patented device. In this suit an interlocutory injunction was granted. Complaint having been made against Hayes for a violation of this injunction, proceedings were instituted against him for contempt, which resulted in an order by the court that he pay the clerk \$1,389.99 as a fine, and that he stand committed until the order was obeyed. To reverse this order, Hayes sued out this writ of error, which Fischer now moves to dismiss on the ground that such proceedings in the Circuit Court cannot be re-examined here. If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only. If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, 7 Wheat. 38 [5 L. Ed. 391], and the rule then established was followed as late as *New Orleans v. Steamship Company*, 20 Wall. 387 [22 L. Ed. 354]. It follows that we have no jurisdiction."

The next case is that of *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853. The suit was a bill in equity in the Circuit Court to restrain infringement of letters patent, and for assessment of damages. A preliminary injunction was issued and served upon the defendants. Afterwards an order was made and entered by the court, entitled in the cause, imposing a fine of \$250 on the defendants, to be paid by them to the complainant, for a violation of the preliminary injunction. This order was opened for a further hearing, and an order was made, entitled in the cause, imposing a fine of \$1,182 on the defendants for such violation, to be paid to the clerk of the court, and by him to be paid over to the plaintiff, for damages and costs; the defendants to stand committed until the same should be paid. An appeal by the defendants from the order was allowed, and an order was made that all proceedings to enforce the collection of the fine be stayed until the further order of the Circuit Court on the giving of a specified bond, which bond was given. On the report of the master on the reference under the interlocutory decree, a final decree was entered that the plaintiffs recover against the defendants \$24,573.91 as profits, and \$386.40 costs. From this final decree the defendants appealed to the Supreme Court. In that court the defendants asked for a review and reversal of the orders imposing fines for violation of the preliminary injunction. The complainant contended that the Supreme Court could not review the action of the Circuit Court in punishing a contempt committed by a violation of such injunction: (1) Because the proceedings were criminal in their character; (2) because the action of the Circuit Court was by section 725 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] expressly made discretionary. The court held, with respect to these objections, that it had jurisdiction to review the final decree in the suit and all interlocutory decrees and orders; distinguishing the facts of the case from those of *Ex parte Kearney*, 7 Wheat. 39, 5 L. Ed. 391, and the case of *New Orleans v. Steamship Company*, 20 Wall. 387, 22 L. Ed. 354. The court also held that section 725 of the Revised

Statutes [U. S. Comp. St. 1901, p. 583] did not make the action of the court imposing a fine for contempt such a matter of discretion that the orders imposing the fines were not reviewable. The court said: "They were, to all intents and purposes, orders in the course of the cause, based on the questions involved as to the legal rights of the parties." It was further held that, although the court had jurisdiction of the suit and of the parties, the order for the preliminary injunction was unwarranted, as a matter of law, and the orders imposing the fines, so far as they had not been executed, were, under the special circumstances of the case, reviewable by the court, under the appeal from the final decree. The final decree of the Circuit Court was reversed, and the case remanded, with directions to dismiss the bill, with costs, but without prejudice to the power and right of the court to punish the contempt referred to in the orders by a proper proceeding.

It appears from these decisions that the Supreme Court draws a distinction between a contempt proceeding where the court is called upon to vindicate its authority and dignity, and where the enforcement of its orders and decrees are, to all intents and purposes, orders in the course of the cause based on the questions involved as to the legal rights of the parties. The first are in the nature of criminal proceedings, and under the law as it stood prior to the act of March 3, 1891, establishing the Circuit Courts of Appeals, the jurisdiction of the Supreme Court to review the judgment of the Circuit Courts in criminal cases was upon a certificate of division of opinion between the judges of the latter court. And since, if the judges of the Circuit Courts disagreed, there could be no judgment of contempt (*California Paving Co. v. Molitor*, 113 U. S. 609, 618, 5 Sup. Ct. 618, 28 L. Ed. 1106), it followed that no cases of that character were reviewed by the Supreme Court. With respect to the second class of contempts, the Supreme Court had authority to review such interlocutory judgments or decrees upon an appeal from the final decree in the cause. This, then, was the state of the law upon this subject when the Circuit Courts of Appeals were established, in 1891, and those courts succeeded to a portion of the appellate jurisdiction previously conferred upon the Supreme Court. There is, however, this difference in the appellate jurisdiction of the two courts: The Supreme Court had jurisdiction to review questions occurring on the hearing or trial of a criminal case in the Circuit Court upon a certificate of division of opinion between the judges of the Circuit Court. The Circuit Court of Appeals has jurisdiction, under the act of March 3, 1891, to review final decisions in a criminal case not capital in either the Circuit or District Court, upon a writ of error.

We now proceed to consider the cases where the Circuit Courts of Appeals have had under consideration the question as to their jurisdiction to review decisions of the District and Circuit Courts in contempt proceedings:

The case of *Nassau Electric Ry. Co. v. Sprague Electric Ry. & Motor Co.*, 95 Fed. 415, 37 C. C. A. 146, was an action brought to restrain the infringement of a patent. The Circuit Court of Appeals for the Second Circuit held that the order imposing a fine for the violation of a preliminary injunction in the cause could not be reviewed upon a writ of error; it could only be reviewed upon an appeal from a final decree

in the cause; citing *In re Debs*, 158 U. S. 573, 15 Sup. Ct. 900, 39 L. Ed. 1092.

In *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 108 Fed. 873, 48 C. C. A. 118, the same court reviewed, upon writ of error, a judgment of the Circuit Court imposing a fine upon the defendant for a violation of an injunction issued by the court against an infringement of a patent. This proceeding was, however, after the final decree sustaining the patent and adjudging an infringement of the patent in the Circuit Court, and after the affirmance of this final decree in the Circuit Court of Appeals.

In *Butler v. Fayerweather*, 91 Fed. 458, 33 C. C. A. 625, an attorney was being examined in a case in the Circuit Court, to which he was not a party. He was asked a question which he refused to answer, upon the ground of privilege. For this refusal he was committed for contempt. A writ of error was sued out to review the order of commitment in the Circuit Court of Appeals. The court held that the order proceeded upon a matter distinct from the general subject of litigation; that the aggrieved party would have no opportunity to be heard when the cause should be before the court at the final hearing, and as to him the proceeding was finally determined when the order was made. Not being a party to the cause, he could not be heard on an appeal from the final decree, and, unless he could be heard upon a writ of error, he had no review, but must submit to the determination of the court below, if the court had jurisdiction, however unwarranted it might be by the facts or the law of the case. The court was of the opinion that it had the power to review the order, and upon the merits reversed the judgment of the Circuit Court.

Flower v. MacGinniss, 112 Fed. 377, 50 C. C. A. 291, was a case in the same court. A witness in an equity cause, not a party to the suit, had refused to submit to an examination upon the ground that issues had not been joined in the cause, and the complainant was therefore not entitled to take his testimony. He was adjudged guilty of contempt. A writ of error was sued out to review the order in the Circuit Court of Appeals. The right to review the order by writ of error was sustained, on the authority of its previous decision in *Butler v. Fayerweather*, *supra*.

In *King v. Wooten*, 54 Fed. 612, 4 C. C. A. 519, certain property in the possession of the receiver of a federal court was levied on and sold for taxes by a state sheriff, and the purchaser replevied it from the receiver, who gave a forthcoming bond. The receiver then filed a petition asking the protection of the court appointing him, and, after hearing, it was decreed that the sale was null and void; that the purchaser and sheriff were in contempt of court; that they desist from any interference with the property; that the purchaser dismiss his replevin action, and that the receiver pay all taxes due the sheriff; and that after the purchaser had dismissed said suit, and the defendants had paid all the costs of the proceeding, they, and each and all of them, should stand acquitted of the contempt of court. Respondents appealed to the Circuit Court of Appeals for the Fifth Circuit. The court dismissed the appeal, holding that the proceeding was clearly a contempt proceeding—one which, in the very nature of the case,

must be summary, to be at all effective; that it was manifestly not intended to conclude the ultimate rights of the purchaser at the tax sale, but was only to the effect and extent that he could not in that way dispossess the receiver.

In the recent case of *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622, before the Circuit Court of Appeals of the Eighth Circuit, Judge Sanborn delivered an elaborate opinion upon the subject of contempt proceedings in the federal courts. The case came before the court upon the petition of two of the judges of the county court of St. Clair county, in the state of Missouri, and upon the petition of their counsel, for the issue of the writ of habeas corpus to relieve these judges from an imprisonment which they were enduring until such time as they should comply with a mandamus of the United States Circuit Court for the Western Division of the Western District of Missouri, which directed these judges to levy a tax to make partial payment upon a judgment recovered by one Douglas against the county of St. Clair, and to make partial payments upon other judgments of like character based upon certain bonds of the county of St. Clair. One phase of the question before the court was the claim that the contempt of which the judges stood convicted was a "distinct and substantial offense against the United States," and that, as such, it fell within the pardoning power of the President of the United States; and, for the purpose of applying to the President for the release of the petitioners, the appellate court was asked to order a stay of proceedings in the lower court. The court reviews numerous decisions upon the subject of contempt, and disposes of the application for a stay of proceedings in the following language:

"This is not a criminal, but a civil, contempt—a proceeding instituted for the purpose of protecting and enforcing the private rights and administering the legal remedies of the judgment plaintiff, Douglas; and, whatever the authority of the President may be to pardon for a criminal contempt, he is, upon principle and upon authority, without the power to relieve from either fine or imprisonment imposed in proceedings for contempts of this character. He has no more power to deprive private citizens of their lawful rights or legal remedies without compensation than have the courts or the Congress."

The further discussion of the subject of contempt by the court is applicable to the question before this court in the present case. The court says:

"Proceedings for contempt are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *Thompson v. Railroad Co.*, 48 N. J. Eq. 105, 108, 21 Atl. 182; *Hendryx v. Fitzpatrick* (C. C.) 19 Fed. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Barn. & C. 652; *People v. Court of Oyer and Terminer*, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; *Phillips v. Welch*, 11 Nev. 187, 190; *State v. Knight*, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; *People v. McKane*, 78 Hun, 154, 160, 28 N. Y. Supp. 981; 4 Bl. Comm. 285; 7 Am. & Eng. Enc. Law, 68. A criminal contempt involves no element of per-

sonal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings."

The court thereupon reaches the conclusion that the proceeding for contempt under which the petitioners were held imprisoned in that case was not criminal in its nature, but civil, remedial, and coercive, instituted and maintained for the purpose of enforcing the private rights of the judgment creditors to the collection of their judgments. The prayer of the petitioners was accordingly denied, and the petitions dismissed.

The case of *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, and 159 U. S. 251, 15 Sup. Ct. 1039, remains to be considered. A bill in equity had been filed by the direction of the Attorney General of the United States in the Circuit Court for the Northern District of Illinois, alleging that Debs and others had combined and conspired together to obstruct the operation of certain lines of railways engaged in interstate commerce and in carrying the United States mails, and that they threatened to continue to restrain, obstruct, and interfere with interstate commerce and the transmission of the mails. The bill prayed for an injunction, which was issued and served upon the defendants. Subsequently an attachment was issued against the defendants, charging them with violating the injunction, and upon a hearing they were found guilty of contempt of court and sentenced to imprisonment. Petitions were thereupon presented to the Supreme Court of the United States on behalf of the defendants, one for a writ of error, and the other for a writ of habeas corpus. The petition for a writ of error was denied. 159 U. S. 251, 15 Sup. Ct. 1039. The court, in its statement of the case upon the petition for a writ of habeas corpus (158 U. S. 573, 15 Sup. Ct. 900, 39 L. Ed. 1092), states that the petition for a writ of error had been denied on the ground that the order of the Circuit Court was not a final judgment or decree. In support of the petition for a writ of habeas corpus a number of objections were urged to the jurisdiction of the Circuit Court to adjudge the petitioners guilty of contempt of court—among others, that the judgment of the court had invaded the constitutional right of the petitioners to a trial by a jury. The Supreme Court sums up its answer to this objection, and states the law of contempt applicable to such a case, in the following comprehensive language:

"In brief, a court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

In the present case the order of the court provided, in substance, that the Butte & Boston Consolidated Mining Company, through its agents and representatives, should be permitted, during a period prescribed in the order, to survey, examine, and inspect certain underground workings from the Rarus, Johnstown, and Pennsylvania claims, beneath the surface of the Michael Devitt claim, owned by the com-

plainant; and for that purpose such representatives of the complainant were to be permitted to remove or open all doors, bulkheads, or other obstructions which might be found in said premises, obstructing and preventing such examination and survey. The order was for the purpose of enabling the complainant to maintain its legal rights in said premises in the pending suits. The action of the appellants in refusing to comply with this order of the court was a resistance on their part to an adjudicated right in favor of the complainant. But it was provided in the judgment of contempt that the commitment should continue only until they should consent to the inspection, examination, and survey of the underground workings specified in the order, and until they should give the necessary orders and provide the necessary means for making such examination, inspection, and survey, and should permit the removal of the obstructions provided to be removed in said order, or until the further order of the court. It was further provided that, when the appellants should comply with the order of the court, the order should be discharged as to both fine and imprisonment against each and all of said parties, and none of the parties should be further held or chargeable thereunder. As said by the court in *In re Nevitt*, 117 Fed. 461, 54 C. C. A. 635:

"They carry the keys of their prison in their own pockets. Governments are founded to administer justice. Courts are established to determine the rights and remedies of litigants by peaceable decisions under the law, instead of by the wager of battle. They are not infallible, but no better method of determining adverse claims has yet been devised."

No constitutional right is denied to the appellants in this case. They are not required to furnish evidence against themselves. They are simply to unbar their doors, stand aside, and allow the representatives of the complainant to ascertain whether in the depths below the surface of their own property the defendant in the suit in which this controversy has arisen is not engaged in extracting and carrying away the wealth of the property. The complainant is simply asking to be allowed to establish and protect its own property and rights, and it would be a miserable failure of justice if the court has not the power to enforce obedience to its orders in such a proceeding.

The next question to be considered in this connection is the objection of the appellants that the Johnstown Mining Company is the owner in possession, and entitled to the possession, of the machinery, shafts, premises, and underground workings required to be used, entered, and inspected under said order of survey, examination, and inspection; that said Johnstown Mining Company is not a party to the action; that Josiah H. Trerise and Alfred Frank are not parties to the action, and therefore not subject to the jurisdiction of the court.

The petition for an order of the court for an examination, inspection, and survey of the underground workings and openings in the Rarus and Johnstown claims was presented to the Circuit Court on October 1, 1903. On October 13, 1903, the Montana Ore Purchasing Company, one of the defendants in the action, filed its answer to this petition, in which it denied generally the allegations of the petition, and, among others, denied that it was in possession or control of the shafts or openings in that portion of the Johnstown and Rarus lode

claims lying north of the Michael Devitt lode claim, or extending into the Michael Devitt lode claim; denied that the survey, inspection, and examination mentioned in the petition was necessary for the purpose of the action, or to enable the complainant to prepare the case for trial, or for any matter connected therewith; denied that the defendants or either of them, by means of workings made from the Rarus or Johnstown claims, or any other means, since the service of the injunction in the case, trespassed upon or mined or extracted any ores from within the Michael Devitt lode claim, or any portions of the claim mentioned in the petition. Upon the petition and answer the court on October 14, 1903, made the order of inspection, examination, and survey prayed for in the petition. Then followed the several appeals to this court to set aside the order of inspection. All of these appeals being denied, an attempt was made to execute the order of the court, when the execution of the order was obstructed by the appellants. In the answer of the Montana Ore Purchasing Company to the order to show cause, filed November 2, 1903, it alleged that it was not then, and had not been since the ——— day of August, 1903, in possession of the Rarus shaft or shafts, or any portion of the Rarus claim lying north of the Michael Devitt claim. On the same day the Johnstown Mining Company filed its special appearance in court, in which it denied the jurisdiction of the court over it to enforce obedience to the order of the court, and expressly of any such order as requested by the complainant, and refused to submit itself to the jurisdiction of the court. There are two deeds in the record, executed by the Montana Ore Purchasing Company, by F. Augustus Heinze, president—one dated August 5, 1903, filed for record in the office of the county recorder on October 17, 1903, and the other dated September 1, 1903, filed for record in the office of the county recorder on November 3, 1903. These deeds convey to the Johnstown Mining Company certain portions of the surface and underground veins of the Johnstown and Rarus claims. The Johnstown Company thus became a purchaser pendente lite, and derived its title and possession from the Montana Ore Purchasing Company after issue had been joined in the suit, and the deeds of conveyance were filed of record after the commencement of the proceedings for inspection, examination, and survey. In our opinion, this change of title to a portion of these claims and underground veins, under the circumstances disclosed by the evidence, in no way affects the question before the court. The Johnstown Company, as such purchaser, became subject to all the proceedings and decrees in the suit relating to the property involved in the suit. The original injunction in the case was directed to the Montana Ore Purchasing Company, and its clerks, agents, attorneys, servants, workmen, and lessees. In the proceedings relating to the order of inspection, that corporation undertook at first to represent all opposing interests, and, as we read the testimony in the case, it is still the real party in interest. The appellant F. Augustus Heinze is the president of that corporation. Josiah H. Trerise, another appellant, testifies that he is the superintendent of the corporation; and Alfred Frank, the third appellant, testifies that he is a mining engineer superintendent in the employ of the Montana Ore Purchasing Company and the

Johnstown Mining Company. The court below, in its judgment of contempt, found as a fact that Heinze, Frank, and Trerise had full knowledge and notice of the order of inspection and its terms, and during all the times mentioned in the order they were able to comply with its terms. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to cancel the true purpose, objects, and consequences of a transaction. 1 Pom. Eq. Jur. (2d Ed.) § 378.

The conclusion we reach is that the judgment of contempt of court which the appellants seek to have reviewed upon the present writ of error is a judgment in a civil proceeding; that it is remedial and coercive in its execution, and that it has been entered by the court for the purpose of enforcing the private rights of the complainant judicially determined in its favor; and that the appellants are subject to its terms and conditions. It follows that it is a judgment that cannot be reviewed upon this writ of error, and the writ of error is therefore dismissed, with costs to the defendant in error.

(129 Fed. 287.)

ALLEN-WEST COMMISSION CO. v. GRUMBLES et ux.

(Circuit Court of Appeals, Eighth Circuit. April 8, 1904.)

No. 1,979.

1. GIFT—INTENTION OF DONOR—RENUNCIATION OF DOMINION—DELIVERY.

A fixed intention by the donor to irrevocably divest himself of title, dominion, and control of the subject of the gift at the very time he attempts to make it, the actual accomplishment of that purpose, and the delivery of the subject of the gift, are indispensable conditions of a valid donation.

2. SAME—CORPORATE STOCK—DELIVERY OF CERTIFICATES.

The delivery of the subject of the gift must be made in the most effectual mode to command dominion over it.

The delivery of certificates of shares of stock, when they are present and their delivery is practicable, is indispensable to a valid gift of stock in a corporation, because the possession of the certificates commands the dominion of the stock in the most effectual way.

3. SAME—DELIVERY OF WRITTEN ASSIGNMENT—EFFECT.

The delivery of a written assignment of stock in a corporation is ineffectual to make a valid gift, while the donor retains the certificates.

4. SAME—EVIDENCE—CONCLUSIONS.

G., the owner of 110 shares of stock in a corporation, delivered a written assignment of his interest in its business to his wife in May, 1899, when he was free from debt. He retained the certificates of the shares, voted them, and received dividends upon them, in money and in stock, until February, 1903, when he had become heavily involved in debt. He then transferred the stock to his wife by an indorsement and surrender of the certificates to the corporation.

Held, G. had no intention in May, 1899, to then divest himself of the dominion and control of the stock, a delivery of the certificates of the stock was indispensable to accomplish such a purpose, and the delivery of the written assignment, while the donor retained and used the certificates to control the stock, was insufficient to complete a valid gift.

¶ 2. See Gifts, vol. 24, Cent. Dig. § 50.
63 C.C.A.—28

5. GARNISHMENT—ORDER ON GARNISHEE TO DELIVER INTO COURT.

Under the statutes of Arkansas, where the garnishee appears by affidavit, and does not appear in person, or submit to an examination, or make default, the plaintiff is not entitled to an order that the garnishee shall deliver the property of the defendant in his possession, or that he shall pay the money which he owes the defendant, into court. His remedy is by compelling an examination under oath, or by an action under section 360, Sand. & H. Dig.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Western District of Arkansas.

The Allen-West Commission Company, a corporation, brought an action against J. H. Grumbles to enforce his liability under the statutes of the state of Arkansas for the debt of a bank of which Grumbles was president, and recovered a judgment of \$21,133.35 against him. No attack is made upon this judgment. The indebtedness which it evidences had arisen in the years 1902 and 1903. On March 30, 1903, the plaintiff issued an attachment in its action against Grumbles, and garnisheed Mary E. Grumbles, his wife. The ground of the attachment and garnishment was that Grumbles had disposed of his property with intent to delay and defraud his creditors. The defendant in the action denied this averment. The issue thus made was tried by the court, which made a special finding of facts, dissolved the attachment, and discharged the garnishee, on the ground that there was no proof that Grumbles had disposed of any of his property with intent to delay or defraud his creditors. The writ of error challenges the judgment of dissolution of the attachment and of discharge of the garnishee, and counsel for the plaintiff in error rely upon the following facts to sustain their averment that this judgment was erroneous:

In May, 1899, the Mann-Tankersley Drug Company was a corporation of the state of Arkansas, engaged in the business of dealing in drugs at wholesale and retail at Pine Bluff, in that state, and the defendant James H. Grumbles was free from debt, and was the owner of 110 shares of stock in this corporation, of the value of \$3,700, which was evidenced by a certificate of his ownership of these shares, which was in his possession. On May 14, 1899, he made and delivered to his wife an instrument in these words:

"Know all men by these presents, that I, J. H. Grumbles, of Nashville, Arkansas, for and in consideration of the sum of five dollars (\$5.00) to me in hand paid by Mary Grumbles, and for the further consideration of love and affection that I have for my beloved wife, Mary Grumbles, and for the further purpose of making a division of my property with my wife, the said Mary Grumbles, the receipt whereof is hereby acknowledged, do hereby bargain, sell, and deliver unto the said Mary Grumbles all my right, title, and interest in the Mann-Tankersley Drug Company business, a corporation organized and existing under the laws of the state of Arkansas, and doing business in the city of Pine Bluff, Arkansas, under the corporate name of the Mann-Tankersley Drug Co., said business being a wholesale and retail drug business, and my interest in said business or corporation being of the value of about thirty-seven hundred dollars. To have and to hold the same unto the said Mary Grumbles, and her heirs and assigns, forever. And I, the said J. H. Grumbles, do hereby covenant to warrant and defend the title to said bargained interest in the said Mann-Tankersley Drug Co. business unto the said Mary Grumbles, and unto her heirs and assigns, forever, with all privileges and rights enjoyed by me in said business.

"Witness my hand and seal this 14th day of May, 1899.

"J. H. Grumbles."

He kept the certificate for the 110 shares of stock in his possession, and voted and received dividends in money upon it until February, 1903. Prior to this time he had incurred his liability to the plaintiff and had become insolvent. On February 7, 1903, the surplus earnings of the 110 shares of stock entitled it to a dividend of 144 additional shares of stock, and these additional shares were issued to and received by Mr. Grumbles. On February

25, 1903, Grumbles indorsed and surrendered the certificates for the entire 254 shares, and caused new certificates therefor to be issued to his wife, Mary E. Grumbles. On March 14, 1903, Mary E. Grumbles sold this stock to innocent purchasers for \$6,032.50. No notice of the May assignment to Mrs. Grumbles was given to the Mann-Tankersley Company until after January, 1903. The stock stood in the name of James H. Grumbles on the books of the corporation until February 25, 1903. The transfers of it subsequent to February 24, 1903, were entered on the books of the corporation, and the certificate thereof was filed with the clerk of Jefferson county, in the state of Arkansas, before the attachment herein was made.

W. B. Smith (J. M. Moore, on the brief), for plaintiff in error.

W. T. Wooldridge (F. G. Bridges, W. P. Feazel, and J. W. Bishop, on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The crucial question in this case is: Did the delivery in May, 1899, by the defendant Grumbles to his wife, of the formal bill of sale of his interest in the Mann-Tankersley Drug Company business, constitute a completed gift of his 110 shares of stock in the corporation, in view of the fact that Grumbles retained the certificate of the shares, kept the stock in his own name upon the books of the company, voted and received dividends upon it until after he had become hopelessly insolvent and then transferred it to his wife by an indorsement and surrender of the certificate without the use of the assignment of 1899, of which no notice had been given to the corporation? If this question should be answered in the affirmative, the transfer by Grumbles to his wife in February, 1903, was no evidence of an intent on his part to hinder or defraud his creditors, because the stock had not been his since May, 1899. If, on the other hand, this question should be answered in the negative, that transfer was conclusively fraudulent as against creditors, because it was a voluntary conveyance, without valuable consideration, after the donor had become heavily indebted to his various creditors.

While the assignment recites a consideration of five dollars and of love and affection, counsel for Mr. and Mrs. Grumbles do not claim, nor has the court below found, that this instrument evidences any sale for value of the 110 shares of stock, or that \$5, or any other sum, was ever paid as a part of the consideration for the execution or delivery of that assignment. Moreover, if that question were presented here for our consideration, the written instrument and the facts disclosed by the findings of the court would lead our minds to the conclusion which counsel for all parties to this litigation have tacitly adopted. At the time the assignment was made the stock was worth about \$3,700. It is not a rational inference that property of this value was sold for \$5. Again, the entire assignment must be read and construed as a whole. When thus read, it declares that it was made for \$5, for love and affection, and for the purpose of making a division of the property of the grantor. The natural inference from these recitals is that it was a voluntary assignment without valuable consideration, and that the reference to the \$5 is the usual form of recital

which is frequently inserted in instruments of this character, when no valuable consideration is actually paid. *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 93, 94, 3 Atl. 286, 57 Am. Rep. 304.

We come, therefore, to the only question to which counsel have addressed their arguments—to the question whether or not, under the law applicable thereto, the facts of this case will sustain the conclusion that the defendant Grumbles made a valid gift of his stock in the Mann-Tankersley corporation to his wife on May 14, 1899, when he delivered to her the assignment in question. In every case of an alleged gift, the burden of proof is upon the donee to establish a complete and valid donation. *Jones v. Falls* (Mo. App.) 73 S. W. 903. Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift in præsentia at the very time he undertakes to make the gift (*Lehr v. Jones*, 74 App. Div. 54, 77 N. Y. Supp. 213; *Bickford v. Mattocks*, 50 Atl. 894, 95 Me. 547; *In re Estate of Soulard*, 141 Mo. 642, 657, 659, 43 S. W. 617; *Newman v. Bost* [N. C.] 29 S. E. 848, 850); the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no farther act of dominion or control over it (*Basket v. Hassell*, 107 U. S. 602, 614, 615, 2 Sup. Ct. 415, 27 L. Ed. 500; *Cook v. Lum*, 55 N. J. Law, 373, 376, 26 Atl. 803); and the delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it. This delivery must be an actual one “so far as the subject is capable of it. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject.” 2 Kent’s Com. 439. If the subject of the gift is a chose in action, such as a bond, a note, or stock in a corporation, the delivery of the most effectual means of reducing the chose to possession or use, such as the delivery of the bond, or the note, or the certificate of stock, if present and capable of delivery, is indispensable to the completion of the gift. *Richards v. Delbridge*, L. R. 18 Eq. 11; *Knight v. Tripp*, 121 Cal. 674, 679, 54 Pac. 267; *Miller v. Jeffress*, 4 Grat. 472, 480; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 487, 21 Atl. 1054; *Wadd v. Hazelton*, 137 N. Y. 215, 219, 33 N. E. 143, 21 L. R. A. 693, 33 Am. St. Rep. 707; *Matter of Crawford et al.*, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; *Liebe v. Battmann*, 33 Or. 241, 54 Pac. 179, 72 Am. St. Rep. 705; *Williams v. Chamberlain*, 165 Ill. 210, 218, 46 N. E. 250; *Gartside v. Pahlman*, 45 Mo. App. 160.

Stock in a corporation is a chose in action, and the certificates are the evidence of its existence and of its amount. They bear some analogy to the title deeds of real estate (*Com. v. Crompton*, 137 Pa. 138, 20 Atl. 417); but they are far more commanding and useful in the handling of the stock they represent than are title deeds in the handling of the land they describe. Because the stock in a corporation is transferred by means of the delivery, or by means of the indorsement and delivery of the certificates, the latter by a sort of mental substitution come to be thought of and dealt in as the stock itself. The stock of corporations is ordinarily transferred on the books of the company

only by the surrender of the certificates and the issue of new ones to the grantees. Hence assignments, bills of sale, and conveyances, without the accompanying possession and delivery of the certificates, are much less effectual or available to command the title, the dominion, or the control of the stock than the mere possession of the certificates themselves. The indorsement and delivery, or the mere delivery, of the certificates, without entry of the transfer upon the books of the corporation, is generally held to constitute a valid sale of the stock between vendor and vendee, or a completed gift of it between donor and donee. Such an indorsement and delivery of the certificates generally enables the holder to enforce a transfer of the title to the stock upon the books of the corporation. *Basket v. Hassell*, 107 U. S. 602, 614, 615, 2 Sup. Ct. 415, 27 L. Ed. 500; *Com. v. Crompton*, 137 Pa. 138, 20 Atl. 417; *Hopkins v. Manchester (R. I.)* 19 Atl. 243; *Walsh v. Sexton*, 55 Barb. 251; *Leyson v. Davis (Mont.)* 42 Pac. 775, 793, 31 L. R. A. 429; *First National Bank of Richmond v. Holland*, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; *Stone v. Hackett*, 12 Gray, 227, 231; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663.

If, by an indorsement and delivery of the certificates of stock with the donative intention, the defendant had completed his gift to his wife, a court of equity would have compelled the corporation to transfer the shares upon its books. The difficulty with this case is that the certificates of shares were not delivered, no intention on the part of the donor to immediately renounce dominion and control of the stock was formed, and no executed gift was made. This was the situation: Grumbles made the assignment of his interest in the drug business to his wife on May 14, 1899. His interest was 110 shares in the stock of the corporation which was operating that business, and he held the certificate of his ownership of these shares while the title to them stood in his name upon the books of the company. The holding of the certificate of shares of stock is the customary and most effectual means of using the rights and privileges which the stock confers. The indorsement and delivery of this certificate is the usual and most efficient way of transferring the stock. Three things were essential to a valid gift of this stock by the defendant: (1) A fixed purpose, at the time he made the assignment to his wife, to then divest himself of all title, dominion, and control of the stock, and to vest these irrevocably in his wife; (2) the immediate and perfected execution of this purpose; and (3) the delivery to his wife of the most effectual means of using and reducing the stock to possession. The indorsement and delivery of the certificate to his wife would have proved all these prerequisites. Such an indorsement and delivery was the true, customary, and most effectual way to evidence the intention to transfer the title, the control, and the dominion of the stock, and to accomplish that purpose. The fact that the defendant did not pursue this plain method is in itself cogent proof that he intended to accomplish no such purpose. He made no indorsement or delivery of the certificate. He made no assignment of the stock by name or description, but simply delivered to his wife an assignment of his interest in

the business of the corporation, which she never used to obtain control or dominion of the stock, but which she quietly tucked away and never brought to light until creditors were pressing her husband for the payment of his debts, nearly four years after she received the assignment. Neither Grumbles nor his wife gave notice to the corporation of this nominal conveyance until after his bank had failed, in February, 1903, and his creditors were clamoring for payment. He received annual dividends upon the stock from May, 1899, until February, 1903. In the latter month a stock dividend of 144 additional shares accrued upon his stock, and he took the additional shares in his own name, and finally, after he had become insolvent, he transferred all these shares to his wife in February, 1903, not by the use of the dormant assignment of 1899, but by the usual and most effectual method—by an indorsement and delivery of the certificates. These are all the facts in this case from which the intention of the defendant when he made the assignment of 1899 may be deduced. He knew how to divest himself of title, of control, and of dominion of the stock; for he did so by indorsement and delivery of the certificates in February, 1903. If he ever intended to do so before that time, the evidence of that intention in this record is imperceptible. A man is presumed to intend the natural and probable consequences of his acts. The consequences of the acts of Grumbles here were that, although he delivered to his wife the dormant assignment, he retained the apparent title, the actual control and dominion of the stock, and the enjoyment of every right and privilege it commanded, for nearly four years after he parted with the written assignment, and until the pressing claims of creditors admonished him that his stock was liable to be applied to the payment of his debts, and then for the first time he invoked its aid. The deduction from these facts is irresistible. It is that the defendant Grumbles intended in 1899 exactly what he did in that and the subsequent years. He intended to retain the appearance of title, the actual dominion, control, and beneficial use of his stock, until the claims of creditors or his own decease compelled him to relinquish them. That intention is fatal to the existence of the gift he asserts. *Gallagher v. Donahy* (Kan.) 69 Pac. 330.

But, even if Grumbles had intended to renounce dominion and control of the stock, he could not have accomplished that purpose by the mere delivery of this assignment, because it had not that effect, and because he failed to deliver to his wife the most effectual and appropriate means of reducing the stock to possession and use—the certificate of the shares. The assignment was by its terms a conveyance of his interest in the drug business and a covenant to defend the title to that interest, together with all the rights and privileges enjoyed by him in the premises. It did not transfer the beneficial use of the stock, the privilege of voting it and of drawing dividends upon it, because these rights and privileges were transferable only by a transfer of the title of the stock upon the books of the corporation, upon the surrender of the certificate. The possession of the certificate was the *sine qua non* of that transfer, and the most extensive effect that the assignment could have had was to give Mrs. Grumbles the covenant or promise of her husband that he would deliver the certificate, so that she could

transfer the stock and secure its beneficial use. But a gift of a covenant or promise is void, because it is unexecuted, and every valid gift must be executed and complete. *Harris v. Clark*, 3 N. Y. 93, 112, 51 Am. Dec. 352.

It is said that the assignment gave the donee the right to compel the defendant to surrender the certificate and transfer the stock. But the fact is that Grumbles' possession of the certificate left him the unrestricted power, by the surrender of the certificate and the sale of the stock to a bona fide purchaser, to deprive his wife of every right under the assignment, except a right of action for damages for conversion of the stock. A gift of a right of action for conversion of stock is not a gift of stock. The present transfer of dominion and control of the stock, so that the donor cannot deprive the donee of it, is essential to a valid gift of stock. The gift of a right of action for conversion of it, or of the possibility of compelling a delivery or transfer of it by a suit in equity, is not sufficient, when the donor retains the unrestrained power to place the title, possession, and control of the stock beyond the reach of the donee at any time, and thereby to defeat such a suit in equity. Again, if the assignment had been in terms a conveyance of the stock, it would not have sustained the defendant's claim of a gift, because he failed to deliver the certificate of the shares. The certificate was the usual and most effective means of reducing the stock to possession and use. It was present. It was capable of manual delivery. In this state of the case its delivery was indispensable to a valid gift, and a separate assignment of the stock without a delivery of this certificate was ineffective.

Counsel for the defendant argue that a complete gift may be made by a written assignment or conveyance, without a delivery of the subject of the gift, and cite authorities to support this position. It is true that in cases where manual delivery of the subject of the gift, or of the evidences which command it, is impracticable or impossible, and in cases in which a written conveyance is the most effectual mode of divesting the donor of dominion and control of the thing, such a conveyance is sufficient. But it is equally true that a written assignment is utterly inadequate, where the delivery of the subject of the gift or the delivery of the evidences of it is practicable, and the latter is the more ready and efficient way of commanding the dominion and control of the subject of the gift. Thus in *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, a gift by means of a written assignment of 20 out of 120 shares of stock that were evidenced by a single certificate was sustained; in *Bond v. Bunting*, 78 Pa. 210, a gift by an assignment of all over \$5,600 that should be realized from an insurance policy was maintained; and in *Banks' Adm'r v. Marksberry*, 3 Litt. 276, a gift by an assignment of the future income of a slave was held valid—without a delivery of the subjects of the gift. But the reason for these decisions is that the delivery of these subjects was impracticable, because others than the donee had rights and interests in them which entitled them to their possession. Again, a gift by means of an assignment made by the owners of a fund that had been collected from an insurance policy and was in the hands of executors of an estate was a good gift without a delivery of the money, because it was not in

the possession of the donors, and hence was incapable of manual delivery by them. *Matson v. Abbey*, 70 Hun, 475, 24 N. Y. Supp. 284. So in *Tarbox v. Grant*, 56 N. J. Eq. 204, 39 Atl. 378, 380, a trust deed to a third party, trustee, for the benefit of the children of the grantor, of his equitable interest in the property, was sustained as a creation of a trust; and in *Walker v. Crews*, 73 Ala. 412, a deed of promissory notes which by its terms reserved the right in the donor to retain and collect the notes, and to invest and reinvest their proceeds for the donee, was sustained as a gift and a declaration of trust, without a delivery of the notes. But an instrument like the assignment at bar, which was executed as an absolute conveyance, and which contains no declaration of trust, cannot be sustained as the creation or the declaration of a trust for the benefit of the donee. *Wadd v. Hazelton*, 137 N. Y. 215, 219, 220, 33 N. E. 143, 21 L. R. A. 693, 33 Am. St. Rep. 707; *Young v. Young*, 80 N. Y. 437, 36 Am. Rep. 634; *In re Estate of Soulard*, 141 Mo. 659, 43 S. W. 617; *Richards v. Delbridge*, L. R. 18 Eq. 11, 14, 15, overruling *Morgan v. Malleson*, L. R. 10 Eq. 475, and *Richardson v. Richardson*, L. R. 3 Eq. 686; *Milroy v. Lord*, 4 De Gex, Fisher & Jones, 264, 274, in which Lord Justice Turner well said: "If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust; for then every imperfect instrument would be made effectual by being converted into a perfect trust." Again, a recorded deed of real estate, or a recorded brand of cattle, in the name of the donee, without a delivery of the subjects of the gifts, may well be sustained, because the donor, by placing the record title in the donee, places the property irrevocably beyond his dominion or control. *Holmes v. McDonald*, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430; *Love v. Francis*, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290; *Adams v. Adams*, 21 Wall. 185, 191, 22 L. Ed. 504; *Hillebrant v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757. But "if an owner of shares of stock in a corporation, intending to give them to A., should take the scrip to the office of the company and surrender it, and receive new scrip in the name of A., has he by this change of title on the books of the company, while retaining the entire possession and control of the scrip, and without any delivery thereof to A., accomplished a valid executed gift of the ownership of the shares to his intended donee? We should say clearly not." *Matter of Crawford et al.*, 113 N. Y. 560, 567, 21 N. E. 692, 5 L. R. A. 71. The reason for the difference between a gift executed by a recorded deed of real estate and one unexecuted by a failure to deliver certificates of stock is that the record title to real estate controls and draws to it the possession and dominion of the property and of its title deeds, while, on the other hand, the possession of certificates of shares of stock commands the dominion and control and the record title of the stock.

The clew to the labyrinth of decisions upon this subject is the reason of the rule which makes delivery of the thing, or of the most available means of commanding its dominion and control, indispensable to the validity of a gift. That reason is the imperative necessity of requiring the renunciation by the donor, not only of all possession, dominion, and control of the thing, but of all appearance thereof, lest

by such an appearance he should lead creditors, purchasers, and others to believe, and to credit him in the belief, that he is the owner of that which in reality belongs to his donee, and lest by fraud and perjury gifts be proved which never in fact existed. *Yancey v. Field*, 85 Va. 756, 8 S. E. 721. This reason of the rule conditions the nature of the delivery it requires, and demands that that delivery shall, in every case, whether evidenced by written assignment or oral statement, consist as far as practicable of a delivery of that thing which will most effectually and irrevocably divest the donor of the dominion and the control of the subject of the gift, and thus of the appearance of title, whether that thing be the subject itself, a symbol of the subject, a written assignment of it, or the patent evidences of it whose delivery constitute the most effectual mode of transferring the dominion over it. In the case at bar that thing was the certificate of the shares. The delivery of that certificate was the most effectual mode of divesting the defendant of his title, of his dominion, and of his control of the stock and of the appearance thereof. It was the most efficient way of avoiding the mischief which the rule of delivery was established to prevent, while, on the other hand, the delivery of the dormant and unused assignment, unaccompanied with the delivery of the certificate, was the least effective for these purposes, and the most efficient way of promoting the mischief at which the rule was leveled. The failure to deliver the certificate was fatal to the alleged gift, because without its delivery the dormant assignment did not irrevocably deprive the defendant of the dominion and control of the stock, but left them all perfectly amenable to his will.

This conclusion is not without support in the decisions of the courts. In *Basket v. Hassell*, 107 U. S. 602, 614, 2 Sup. Ct. 415, 27 L. Ed. 500, a case in which the Supreme Court held that the delivery of a certificate of deposit to an intended donee, with an indorsement upon it to pay it to the latter's order, but not until the donor's death, was not a valid gift, because it did not deprive the donor of the present power of dominion and control. That court declared, as a result of a review of the authorities relative to the delivery of a chose in action, that the rule was—

"That the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably."

In *Knight v. Tripp*, 121 Cal. 674, 676, 679, 54 Pac. 267, the Supreme Court of California held a formal written assignment delivered to the donee insufficient to sustain a claim of a gift, and said:

"There must be both a purpose to give and the execution of this purpose. The purpose must be expressed, either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor; but by itself it no more establishes the gift than would the same words orally delivered by the donor. * * * It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift."

In *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 93, 96, 3 Atl. 286, 57 Am. Rep. 304, the subject of the intended gift was stock in a

corporation, the certificate for which remained uncut in the stock book of the company. Thereupon the owner made a written assignment of the stock to his daughter, which recited that it was for value, although no valuable consideration was actually paid, and delivered it to the attorney for the corporation, with instructions to transfer the stock to the daughter on the books of the company as soon as the attorney obtained the consent of the mortgagee of the corporation. The court held that the intended gift was incomplete and void, because the owner had not irrevocably parted with his control and dominion of the stock.

In *Matthews v. Hoagland*, 48 N. J. Eq. 455, 485, 490, 21 Atl. 1054, 1065, 1067, the court refused to sustain an attempted gift of stock, evidenced by the delivery of the indorsed certificates, without any accompanying assignment, on the ground that—

"The failure of the record owner of the stock to clothe the donee with the means of at once acquiring the benefits of the stock leaves unperformed an act which prevents the gift from taking effect in præsentī, which is vital to a gift *inter vivos*."

In *Snyder v. Snyder* (Mich.) 92 N. W. 353, 354, an attempt was made to sustain a gift of a mortgage by means of a written assignment made by the donor to her son in 1888 and recorded in 1893. But it was defeated, because until she died in 1899 the donor enjoyed the beneficial use of the mortgage, not by virtue of any of the terms of the assignment, but by virtue of an oral agreement aliunde to that effect.

In *Snook v. Sullivan*, 53 App. Div. 602, 607, 66 N. Y. Supp. 24, affirmed in 167 N. Y. 536, 60 N. E. 1120, an alleged gift, evidenced by an assignment and delivery of the certificate of the stock, was defeated, where the donee, after the assignment, drew the dividends, as he had done before, as attorney in fact of the donor, and presumably applied them to her use.

And in *Bauernschmidt v. Bauernschmidt*, 97 Md. 35, 54 Atl. 637, 642, 643, the Court of Appeals of Maryland held that there was no completed gift of stock by a husband to his wife, although he placed the title of 30 shares of it in her name upon the books of the corporation and issued a certificate therefor in her name, which he subsequently surrendered to the corporation, and although he caused 140 shares of the stock to be transferred to himself and his wife, and caused a certificate therefor to be issued in their names, because during all this time he actually had the dominion and control of the stock by virtue of his possession of the certificates. The court declared in words which are peculiarly applicable to the facts of the case before us:

"He, and he alone, voted the 140 shares, and his final assertion of control over the certificate representing those shares was manifested when he transferred it in blank and delivered it to Sperry, Jones & Co. His dealing with the stock, and her acquiescence in what he did, and the fact that he could, and did, as the actual owner of all the property which the company possessed, exercise complete control over those 140 shares, show that he had never surrendered dominion over them, or put it out of his power to revoke the gift of them."

Other authorities almost without limit could be cited in support of the position that this alleged gift was incomplete and invalid, because

the defendant failed to renounce dominion and control of its subject; but perhaps our views have already been sufficiently illustrated, and farther discussion will be omitted.

The dormant assignment of May 14, 1899, did not effect a valid gift of the stock of the defendant Grumbles, because he then had no intention to immediately and irrevocably divest himself of the control and dominion of the stock, because he retained the possession of the certificate, and all the rights and privileges which the stock conferred, until February, 1903, and because he failed until that time to irrevocably divest himself of the title, dominion, and control of the stock. As this stock remained his property until many months after his indebtedness to the plaintiff accrued, his voluntary transfer of it to his wife in 1903 was in the eyes of the law a fraud upon the plaintiff, and the judgment of the circuit court that the attachment be dissolved, and the garnishee, Mary E. Grumbles, be discharged, cannot be sustained.

The statutes of Arkansas provide that each garnishee summoned shall appear in person or by his affidavit disclosing his indebtedness to the defendant and the property of the defendant in his possession (Sand. & H. Dig. § 357); that he may be required to appear in person and to submit to an examination under oath; that if, when he appears in person and is examined under oath, and when he makes default by failing to appear and the court hears proofs, the court finds that he has in his possession property of the defendant or that he is indebted to the defendant, it may order the garnishee to deliver the property or to pay the amount of the debt into the court. Sections 358, 359, Sand. & H. Dig. The counsel for the plaintiff ask this court to direct the court below to order the garnishee, Mrs. Grumbles, to pay the proceeds of the sale of the defendant's stock which she has received into the Circuit Court upon the reversal of the judgment dissolving the attachment and discharging the garnishee. But the garnishee, Mrs. Grumbles, has not as yet come within the terms of the provisions of the statutes which have been cited. She has not appeared in person or been examined under oath. She has not made default in appearance. She appeared by her affidavit, in which she denied that she was in possession of any of the property of the defendant, and denied that she was indebted to him. In this state of the case the court below may undoubtedly compel her to appear in person and to submit to an examination under oath, and then, if the evidence sustains the charge of the plaintiff, it may order her to pay the proceeds of the sale of the stock into court. But, in the absence of any proceeding of this character and of any appearance of Mrs. Grumbles in person, the remedy of the plaintiff is to proceed against her by an action under section 360, Sand. & H. Dig., which provides that, when the garnishee fails to make a disclosure satisfactory to the plaintiff, he may proceed in an action against her by filing a complaint and causing a summons to be issued upon it. The time has not yet arrived under these statutes when the plaintiff is entitled to an order on the garnishee to pay the moneys she obtained from the sale of the stock into court.

The judgment of the court below, that the attachment be dissolved, and that the garnishee, Mrs. Mary E. Grumbles, be discharged, must be reversed, and the case must be remanded to the Circuit Court, with

instructions to enter a judgment that the attachment is sustained, and to take further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

(129 Fed. 298.)

CITY OF MOBILE v. SULLIVAN TIMBER CO.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,312.

1. LAND UNDER NAVIGABLE WATERS—OWNERSHIP.

The state of Alabama, when admitted into the Union, acquired by the compact the title to the soil below high-water mark under the navigable waters within the limits of the state which had not been previously granted.

2. SAME—CONVEYANCE—TRUSTS.

By Act Ala. Jan. 31, 1867 (Laws 1866-67, p. 307), granting to the city of Mobile so much of the shore and soil under the Mobile river as was within the city's boundaries, the city acquired title to the land so conveyed as trustee for the public, and could not convey the same for the benefit of riparian proprietors.

3. SAME—IMPLIED LICENSE—CUSTOM.

Where a city held the title to the land under a navigable river within the city's limits below high-water mark in trust for the public, a custom under which riparian proprietors used the land for the erection of wharves, etc., was not available to support a contention that the city had thereby been divested of its title to the land.

4. SAME—ESTOPPEL.

Where a city held the title to land under a navigable stream in trust for the public, and a river commission was authorized to establish wharves, bulkheads, boom lines, etc., the fact that neither the city nor the commission objected to the construction of expensive works, including bulkheads, etc., in the river, by a riparian proprietor, did not estop the city to deny such proprietor's right to continue to occupy the same.

5. SAME—CONDEMNATION.

Where a riparian proprietor, with the knowledge of a city holding the title to land under a navigable stream for the benefit of the public, constructed an expensive work, including wharves, booms, bulkheads, etc., on the land, in order to render the river available for use in lumbering operations, and thereafter such proprietor paid taxes and fees to the city for the privilege of erecting and maintaining such structures, the city was only entitled to a restoration of the land so used on payment of reasonable compensation to such proprietor for the loss sustained.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

L. H. & E. W. Faith, for complainant.

Gregory L. & H. T. Smith, for defendant.

Before McCORMICK, Circuit Judge, and SPEER and PAR-LANGE, District Judges.

SPEER, District Judge. This cause presents an appeal from a decree of the Circuit Court for the Southern District of Alabama. It appears from the record that the Sullivan Timber Company, a cor-

¶ 1. See Navigable Waters, vol. 37, Cent. Dig. § 184.

poration of the state of Florida, had been sued in ejectment by the city of Mobile to recover two pieces of real estate. This was riparian land. One lot was between Old Water street and the channel of the Mobile river on its western side, and the other was between the channel of the Mobile river and a line parallel with and 100 feet east of the high-water mark on the western side of the river. These actions were brought by the city of Mobile to assert its title not only to the shore and part of the river bed, but also to the immediately abutting upland. The title to this land was originally in the United States government, and it passed to the state of Alabama by virtue of the act of Congress under which the state was admitted into the Union. Subsequently the title passed to the city of Mobile by virtue of certain statutes. The first was approved January 31, 1867 (Laws 1866-67, p. 307), and provides that the shore and the soil under Mobile river situate within the boundary lines of the city of Mobile, as defined and set forth in section 2 of the act to incorporate the city of Mobile, approved February 2, 1866 (Laws 1865-66, p. 202), "be and the same is hereby granted and delivered to the city of Mobile." The second section declares the municipal authorities of the city trustees "to hold, possess, direct, control and manage the shore and soil herein granted in such manner as they may deem best for the public good." Again, on December 5, 1896 (Acts 1896-97, p. 49), the General Assembly of Alabama enacted—

"That the absolute and unconditional title and right to all real estate, rights, and easements, pertaining, or incidental, to any real estate, or any right therein, or thereto, heretofore vested in the mayor, alderman and common council of the city of Mobile, or in the port of Mobile, or in the present city of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust, or otherwise, except such as have heretofore vested in the trustees for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best."

These statutory grants to the city of Mobile are in accordance with the salutary principle embodied in the Constitution of many of the states, including that of the state of Alabama, by which it is guaranteed that the navigable waters of the state shall be forever preserved as public highways.

It is alleged that the Sullivan Timber Company, which was the defendant in the actions of ejectment brought by the city, had taken possession of the shore and soil in controversy, and had erected thereon certain wharves and other obstructions, which set out into the river midway between the shore and what is termed "the point of practical navigability." These structures were wholly disconnected with the shore and with the navigable channel, and have the effect to obstruct all communication between the shore and the navigable part of the stream. By these structures, it is insisted that the defendant has inclosed a part of the Mobile river, and, excluding all other persons therefrom, uses this to float its own barges and logs. It is insisted by the city that the action of ejectment was brought to maintain the communication between the upland belonging to the city with the navigable river, and to assert its public ownership, in order that all portions of this important navigable stream and harbor,

upon which definite rights of wharfage have not been granted, may remain available to the general public in accordance with the act under which the state was admitted into the Union. These actions having been instituted in the state circuit court of Mobile county, Ala., the defendant thereto, the Sullivan Timber Company, caused them to be removed into the United States Circuit Court, and, after removal, there filed the bill on which the decree here complained of was rendered.

By the averments of this bill the following contentions are presented for the complainant: First. That the city of Mobile claimed the lands under the act of January 31, 1867, which vested the title in the city as trustee for the public good. That this enactment, in connection with the act of February 18, 1895 (Acts 1894-95, p. 815), as amended by the act of December 5, 1896 (Acts 1896-97, p. 49), vested the absolute and unqualified legal title to the shore and soil under Mobile river in the city of Mobile, discharged and freed from the trust created by the act of 1867. That this was the sole title of the city of Mobile. That the municipal corporation for whose benefit these enactments had been passed had been annulled and abolished on February 11, 1879, and, as a substitute therefor, a new municipal corporation was created, called the "Port of Mobile." That the Legislature of Alabama gave this new corporation no power, title, authority, or jurisdiction to the shore and soil under the Mobile river. However, by an amendment made to its charter on December 8, 1880, the corporation was given power to establish and declare by ordinance a designated line along the river front, within the corporate limits of the city, beyond which wharves and other structures should not be built. That, acting under the authority last mentioned, in 1882, the police board of the port of Mobile established such channel lines, and declared that wharves and similar structures should neither extend beyond nor fall short of said lines. By the act of December 10, 1886, the municipality was again entitled the "City of Mobile," and it was given power to establish channel lines, but with the proviso that, if the Legislature should create a harbor commission, the power in the city of regulating wharf and boom lines should be suspended so long as the commission was clothed with that power. That on February 28, 1887, such a commission, with such power, was created. It was organized in 1887, and is now exercising the powers and jurisdiction given to it by the act. The bill further alleges that the timber company owns the upland in front of which is the locus in quo; that its predecessors in title and itself, at great expense, built wharves, bulkheads, booms, etc., on the shore and over the water in front of their upland out to the established lines; that at still further expense it had built in the lower marsh land, and improved the upland—built sawmills, etc., thereon; that these improvements were made under permission obtained from the city of Mobile and the Mobile river commission, respectively, and the work was done under the supervision of the appellant's civil engineer. The bill further avers that the timber company, which is the appellee here, as the owner of the upland, had the right of access from its upland to the navigable portion of said river in front of it, and to the wharves

built out thereto, subject to such reasonable regulations as the city might prescribe. This right, it is averred, was secured by the common law of the state of Alabama, as well as by the Constitution and statute laws thereof.

There are the usual prayers for process and for temporary injunction pendente lite. Another and more important prayer is that on the hearing:

"The court will be pleased to perpetuate such injunction, and decree that the city of Mobile and all persons claiming under it be perpetually enjoined and restrained from prosecuting said ejectment suits aforesaid, and from molesting or disturbing your orator in the possession of said property out to the said channel lines of Mobile river, as established, and from asserting title or claim thereto, and, further, that the court may be pleased to quiet the right, title, and possession of orator in its wharf, bulkheads, and improvements from orator's upland out to the said channel line of Mobile river aforesaid."

Motions to dismiss the bill for want of equity and demurrers thereto were overruled, and certain amendments followed. The bill as amended was retained in court, and upon the pleadings and proof the court rendered a decree in favor of the Sullivan Timber Company, and the city of Mobile brought this appeal.

A reference to the decree granted by the court will discover that it is of the most sweeping character. By its perpetual injunction it finally concludes the appellant from asserting any claim whatever to, or from any interference with, the use and possession by the Sullivan Timber Company of its wharves, docks, booms, and other improvements erected by it, in front of its upland, on the lands and premises in controversy. It clearly has the practical effect to vest the fee to this important wharf property, which may be highly essential to the future prosperity of the port, in the Sullivan Timber Company, and its successors in title.

We are of the opinion that while that company may possess equities of importance, which the court, after proper inquiry, may feel authorized to protect, the decree transcends any right to which the complainant is entitled, and has the effect to reverse the policy of the state, intended to secure to the public access to its navigable streams and harbors. This policy is increasingly important in view of the already augmented commerce of the Gulf ports, and the phenomenal augmentation which will necessarily be caused by the construction of the Isthmian Canal.

While the briefs of opposing counsel in this case afford a great plentitude of authority, and, indeed, exhibit commendable industry and research, our determination with regard to the title of the city must be controlled by the latest and most authoritative decision upon the subject. This is found in the case of *Mobile Transportation Co. v. Mobile* (decided by the Supreme Court of the United States January 5, 1903) 187 U. S. 479, 23 Sup. Ct. 170, 47 L. Ed. 266. There it is conclusively settled that the state of Alabama, when admitted to the Union, became entitled to the soil under the navigable waters below high-water mark within the limits of the state, not previously granted. It is further held in the same case that the legislation of the state conveying to the city of Mobile the shore and soil under Mobile river is not unconstitutional,

as impairing the vested rights of owners of grants bordering on Mobile river, for the reason that such grants do not relate to land bordering on tidal streams; and further that, as the state held the lands below high-water mark as trustee for the public, it had the right to devolve the trust upon the city of Mobile. In short, this case adjudicates the title of the lands in controversy under the acts and resolutions of Congress, the ordinances of Alabama, and the acts of the General Assembly of the state hereinbefore enumerated. It is difficult, in view of this decision, to understand how any controversy can be maintained as to the title of the city. Many decisions of the Supreme Court of Alabama are reviewed in the learned opinion of Justice Brown. His conclusions are, as stated, that the title to all lands under tidal waters in Alabama below high-water mark are in the state, and subject to such disposition as that made by the state in this case in behalf of the city of Mobile. He continues:

"The status of real estate within a particular jurisdiction is not so much one of contract as of policy, which may be changed at any time by the Legislature, provided no vested rights are disturbed. Of course, if riparian proprietors have acquired the title to the property below high-water mark by a grant or prior possession good against the state, they could only be dispossessed by proceedings in eminent domain. The act of 1867 declared no more than that the rights possessed by the state in the shore and soil under Mobile river were granted to the city. We see nothing objectionable in this act. What the state held, it held as trustee for the public, and it had a right to devolve this trust upon the city of Mobile. What it had not, it could not grant, and the rights of the riparian proprietors were neither enlarged nor restricted by the act." "Upon the whole," the learned justice concludes, "we are of opinion that there is no defect upon the face of the title of the city which the transportation company was entitled to avail itself of."

It is true that in that case the court expressly declined to pass upon the defenses of estoppel by reason of improvements made upon this land with the acquiescence of the city, license to build wharves, and payment of taxes; the unconstitutionality of the act of 1867, because the title of the act does not describe its subject; want of power in the state to convey its title to the city; and the statute of limitations. The Supreme Court makes no deliverance upon these subjects, because they are all of a local nature, and present no federal question. Some of these are, however, in the case at bar, for the reason that jurisdiction of the cause is now taken because the controversy is between citizens of different states.

Starting, then, with this authoritative demonstration that the legal title to the locus in quo is in the city, upon what equity can there be based a right in the complainant to the perpetual injunction granted, which will forever debar the city from the assertion of that title?

It is urged in behalf of the appellee that its structures were erected under a license granted by the Mobile river commission. This, however, seems to stand exclusively upon the nonaction of that commission, rather than upon any express permission. Surely it will take something more than proof of the quiescence of a commission like that to estop the municipality which holds title for the public benefit from proceeding with its duty to protect the public interest. Estoppels are not favored by the law, and this would

seem especially true when by such estoppel it is attempted, by the omission or indifference of officials, to finally conclude the rights of the public to a public use. The alleged immemorial custom of persons to erect wharves on such broad harbor lines as those of the Mobile river and the adjacent waters, even if clearly demonstrated, can have no legal effect against the assertion by the state of its right to control the wharf lines of its navigable streams. For a custom to be valid, it must be lawful; and it can never be lawful for the citizen or a corporation to take possession of property belonging to a state, or a municipality created by it, hold it indefinitely, and justify that conduct by proof of custom. Indeed, did the claim of the appellee depend upon a positive and perpetual grant from the city, if given without proper consideration, it would be in this case of no more avail than the quiescence of the commission or the immemorial custom on which the appellee relies. The rights of the public cannot be divested in such manner. In the case of *Mayor of Jersey City v. American Dock & Improvement Company* (N. J.) 23 Atl. 682, Chief Justice Beasley, for the court, declares:

"Nor would even the joint action of the board and the city give a semblance of legality to the transaction. If the municipal corporation had, by the most formal writing, assented to the commission's grant, and had joined in it as a party, the instrument would have been an absolute nullity. This result proceeds from the characteristics of the property in question, and which have been heretofore fully defined. The title is vested in the city in trust for the public, and is therefore inalienable and indisposable, except by legislative action. The composition of the so-called title of the defendant, it will be observed, consists of the acquiescence and neglect of the trustee of a public use, and the act of a board having no power over the subject. Such a claim seems to be singularly futile."

It is true that the act of 1896 to which reference has been made seeks to make a change in the character of this property and the manner in which it may be disposed of, but, since this was long after the concurrence upon which the appellee places reliance, it does not affect the question.

It is, however, contended by the appellee that it has paid to the city fees and taxes for the privilege of erecting its structures; that these were accepted; that its work was done in compliance with the rules and regulations of the commission, and under the supervision of the city engineer; that neither the city of Mobile, nor the river commission, ever made any objection or protest against its expensive work, such as filling in of the lowlands, construction of bulkheads, wharves, and booms; that the city of Mobile stood silently by and permitted all this to be done without objection, and without challenge of the occupation being made by the appellee during a long series of years. Upon these facts it is urged that it would now be unconscionable to permit the city to oust the appellee, and thus inflict upon it the great loss which would necessarily result. It seems highly probable that such facts make a meritorious showing for suitable relief, on proper pleadings. It is equally clear that these contentions could not forever defeat the right of the city to control the wharfage within its jurisdiction. A simple illustration

will show how untenable is the appellant's claim on this subject. The defendant's structures are in their nature temporary; its business, of a character possibly limited by the available timber supply. When the uses of its structures have departed, they will rapidly decay. Can it be insisted that, because of its license to erect them, it can retain the title to the riparian soil upon which they stand? If this were true, a licensee erecting structures of the most perishable character might acquire, without consideration, wharf rights as valuable as the docks on the Mersey at Liverpool, or the piers on the Hudson at New York. While, therefore, this claim must be denied, it does not follow that the appellee is without a remedy. If its structures have been erected, and its outlay and expenditure have been made, because of a license granted by the city, before the city, for its own purposes, can reassume control of the real estate in dispute, there should be a just accounting, and ascertainment and allowance of compensation for the losses the appellee will incur because of the negligent or unjustifiable action of the city authorities. The true equity seems to be found on the median line between the contentions of the controverting parties. The city, for the public welfare, is entitled to control its river front, except where the title to its wharves is parted with in compliance with positive law. If it is deemed necessary by the city to cause the removal or destruction of the appellee's wharves, sawmills, and booms, a judicial estimate should be made of the damage to the appellee thus incurred. Since, however, there are no averments or prayers in the bill before the court which will justify such direction, it will be incumbent upon the appellee, who was the complainant in the Circuit Court, to amend the bill in such manner as to avail itself of the relief and compensation, which may be ascertained by an appropriate inquiry.

In view of these considerations, we determine that the decree of the court below be modified as follows, and it is accordingly ordered: That the permanent injunction granted be set aside, and the temporary injunction pendente lite be reinstated. That the appellee, who is the complainant in the Circuit Court, have leave within 30 days from the date whereon the mandate of this court shall be made the judgment of the Circuit Court to amend its bill, and by such amendment offer to restore to the appellant the real estate in dispute upon the payment of such compensation as may, by agreement between the parties, or upon judicial inquiry, appear to be equitable and just, for the losses and damages, if any there be, which it may appear the complainant will sustain because of the revocation by the city of its implied license to erect said structures. That in case such suitable amendment, with appropriate prayers, is made, the bill as amended will proceed as usual in equity. In case, however, the appellee, the complainant in the Circuit Court, shall not exercise the option offered of amending his said bill, it is directed that at the expiration of the time above specified the same shall be dismissed at the cost of complainant. That the cost of this appeal be taxed against the appellee.

(128 Fed. 665.)

In re BRODIE. In re COFFEY. In re HANSHEW. In re MORRIS.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1904.)

Nos. 36, 37, 38, 39.

1. ARMY REGULATIONS—ESTABLISHMENT—ACTS OF SECRETARY OF WAR.

Rules and orders promulgated by the Secretary of War for the government of the army are presumed to be issued by the Secretary with the approbation and under the direction of the President, as commander in chief, though they do not expressly so state.

2. SAME—EFFECT.

Army Regulations, par. 940, providing that, when the sentence of a court-martial prescribes imprisonment, the court shall state therein whether the prisoner shall be confined in a penitentiary or at a post, being guided in its determination by the ninety-seventh article of war (Rev. St. p. 239 [U. S. Comp. St. 1901, p. 967]), is not a statute, but a rule or regulation promulgated by the Secretary of War under authority of the president, and therefore subject to modification by the same authority.

3. SAME—COURT-MARTIAL MANUAL—PROVISIONS—EFFECT.

Court-Martial Manual 1895, promulgated by the Secretary of War, and directing in a footnote: "Unless the laws of the state, territory, etc., in which the court-martial is convened, are at hand, it is impossible for the court to determine in all cases whether or not, under the ninety-seventh article of war, the offender is punishable by a penitentiary confinement. Therefore, in case of any doubt, the words 'in such place as the reviewing authority may direct' will be used in the sentence"—which direction was repeated in like manuals issued by the Secretary of War in 1898 and 1901, operated to qualify Army Regulations, § 940, before named.

4. SAME—FOOTNOTES.

A footnote to a rule or regulation is not less authoritative than the principal text, where the language of the footnote and the general character of the principal text point to a single authorship, and an intention that the footnote shall command respect and obedience in like manner as the body of the rule or regulation.

5. SAME—PROMULGATION.

Where an order of the Secretary of War promulgating army regulations stated that they were published by the direction of the President for the "government" of all concerned, and an order promulgating the manual for courts-martial, made no reference to the president, but stated that the manual was published for the "information and guidance" of all concerned, in legal contemplation the two orders spoke by the same authority, and were of equal dignity.

6. SAME—COURTS-MARTIAL—JURISDICTION—COLLATERAL ATTACK.

Whether, within the meaning of Army Regulations, § 940, as qualified by the footnote in the court-martial manual before named, the local law is impossible of ascertainment by the court-martial, is a question for that court to determine, and, where the form of the sentence resolves that question in the affirmative, such sentence is conclusive upon that matter and not open to collateral attack.

On Petitions for Writs of Habeas Corpus.

In response to writs of habeas corpus issued upon the respective petitions of Edward M. Brodie, James F. Coffey, Andrew C. Hanshaw, and John H. Morris, the warden of the United States penitentiary at Fort Leavenworth, Kan., made returns showing that the petitioners were held in confinement in that penitentiary under approved sentences of military courts-martial. From these returns, upon which no issue of fact has been taken, it appears: Brodie and Coffey, privates in the Third Cavalry, were tried February 1, 1901, before a general court-martial, at San Fernando de la Union, Luzon, P. I., upon

a charge of murder, under the fifty-eighth article of war, alleged to have been committed by them jointly in the Philippine Islands, in time of insurrection, and within territory occupied by the armed forces of the United States. Each was found guilty, and sentenced "to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life." The finding and sentence were approved February 18, 1901, by the department commander, Maj. Gen. Wheaton, who ordered the court, and the Billbid prison, Manila, P. I., was designated by him as the place of confinement. After being confined for a time in this prison, Brodie and Coffey were transferred, under paragraph 946 of the army regulations of 1895 (paragraph 1047, regulations of 1901), to the Ft. Leavenworth Penitentiary, for the completion of their sentences. Hanshew, a musician in the Coast Artillery, was tried December 19, 1901, before a general court-martial at Fort Screven, Ga., upon a charge of attempt to commit rape. He was found guilty, and sentenced "to be confined at hard labor at such place as the reviewing authority may direct for twelve years." The finding and sentence were approved January 6, 1902, by the department commander, Maj. Gen. Brooke, who ordered the court, and the Ft. Leavenworth penitentiary was designated by him as the place of confinement. Morris, a private in the Ninth Cavalry, was tried September, 24, 1900, before a general court-martial at Ft. Grant, Ariz., upon charges of desertion and larceny. He was found guilty, and sentenced "to be confined at hard labor at such post or penitentiary as the reviewing authority may direct for four years." The finding and sentence were approved October 16, 1900, by the department commander, Brig. Gen. Merriam, who ordered the court, and the Ft. Leavenworth Penitentiary was designated by him as the place of confinement.

Byron F. Babbitt, for petitioners.

John S. Dean, U. S. Atty., and John Biddle Porter, for respondent.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the cases as above, delivered the opinion of the court.

But a single question is presented in each of these cases: Is the sentence of the court-martial void because, instead of prescribing the character of the confinement—whether at a military post or in a penitentiary—it leaves the determination of that matter to the reviewing authority? The question is solved by a careful consideration of pertinent provisions of the articles of war and of the army regulations. The ninety-seventh article of war (Rev. St. p. 239, 1 U. S. Comp. St. 1901, p. 967) declares:

"No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the state, territory, or district in which such offense may be committed, or by the common law, as the same exists in such state, territory, or district, subject such convict to such punishment."

This article does not require any offender to undergo confinement in a penitentiary, but merely restricts that character of punishment, under military law, to those cases where it could be imposed if the conviction were in the civil courts. *Ex parte Mason*, 105 U. S. 696, 700, 26 L. Ed. 1213. The insistence of petitioners is not that the offenses of which they have been severally found guilty are not punishable, upon conviction in a civil court, by imprisonment in a penitentiary, but that under the military law there is a discretion to punish the com-

mission of these offenses by imprisonment at a military post or by imprisonment in a penitentiary; that these punishments are essentially different in character, the latter being greater and more odious; and that the discretion to choose between them, or to determine which shall be imposed, is lodged in the court-martial, and cannot be left by that body to the reviewing authority. The fifty-eighth article of war (Rev. St. p. 235, 1 U. S. Comp. St. p. 955) directs:

"In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault, and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the state, territory, or district in which such offense may have been committed."

If read and considered in the light of the law of the place where their offense was committed, it is possible or probable that under this article, and by reason of the conditions existing in the Philippines at the time, the sentences of Brodie and Coffey impose confinement in a penitentiary, and leave to the reviewing authority no discretion as to whether the place of confinement shall be a military post or a penitentiary, but only a duty, upon approval of the sentences, to designate the particular penitentiary in which the convicts shall be confined—a matter which, by paragraphs 941 and 946 of the army regulations of 1895 (paragraphs 1042 and 1047, regulations of 1901), rests in the department commander or higher authority. Counsel for the respondent have not brought to our notice the local laws applicable under the fifty-eighth article. Petitioners have presented their cases as if that article affected none of them, and the conclusion at which we arrive upon the principal question renders it unnecessary for us to consider any other.

The contention of petitioners is based upon paragraph 940 of the army regulations of 1895 (paragraph 1040, regulations of 1901), which says:

"When the sentence of a court-martial prescribes imprisonment, the court will state therein whether the prisoner shall be confined in a penitentiary or at a post, being guided in its determination by the 97th article of war."

If this be the entire military law upon the subject, there can be no doubt that a court-martial, in imposing imprisonment as a punishment, where there is a discretion to say whether it shall be at a military post or in a penitentiary, is required to designate or prescribe in the sentence the character of the imprisonment in this respect. But we think there is another regulation upon the subject which modifies paragraph 940, and excepts these cases from what would otherwise be its plain requirement.

Before pointing out the other and modifying regulation, some prefatory observations may properly be made. The law governing courts-martial is found in the statutory enactments of Congress—particularly in the articles of war, in regulations prescribed by executive authority, and in military usage and procedure. *Carter v. McClaghry*, 183 U.

S. 365, 386, 22 Sup. Ct. 181, 46 L. Ed. 236. Subject to the Constitution and to the laws of Congress, the President, as commander in chief, is authorized to establish and enforce such rules and regulations for the government of the army as he may deem essential to the maintenance of a high standard of efficiency, discipline, and honor, and, as a means to this end, may properly provide for the trial of accusations against persons in the military service, and for the punishment of offenses by them. "The power to establish implies necessarily the power to modify or repeal, or to create anew. The Secretary of War is the regular constitutional organ of the President, for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and, as such, be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or denied because they may be thought unwise or mistaken." *United States v. Eliason*, 16 Pet. 291, 301, 10 L. Ed. 968; *Kurtz v. Moffitt*, 115 U. S. 487, 503, 6 Sup. Ct. 148, 29 L. Ed. 458. Nor is it necessary for the Secretary of War in promulgating such rules or orders to state that they emanate from the President, for the presumption is that the secretary is acting with the President's approbation and under his direction. *Parker v. United States*, 1 Pet. 293, 297, 7 L. Ed. 150; *Wilcox v. Jackson*, 13 Pet. 498, 512, 10 L. Ed. 264; *Williams v. United States*, 1 How. 290, 11 L. Ed. 135; *United States v. Freeman*, 3 How. 556, 566, 11 L. Ed. 724; *Confiscation Cases*, 20 Wall. 92, 109, 22 L. Ed. 320; *United States v. Farden*, 99 U. S. 10, 19, 25 L. Ed. 267; *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915; *United States v. Fletcher*, 147 U. S. 84, 89, 13 Sup. Ct. 552, 37 L. Ed. 378; 7 Op. Attys. Gen. 453.

In the absence of some statutory provision to the contrary, it is established law in England and in this country that in criminal cases the court determines what, within the limits fixed by law, shall be the quantum and character of the punishment. In other words, the question is not necessarily to be determined by the triers of fact. 1 Bishop, New Cr. L. § 394. While a court-martial cannot be altogether likened unto a civil court, in which the guilt of the accused is to be pronounced by a jury, under the supervision of a judge, and the penalty is to be fixed by the judge within the prescribed limits, it is yet true that a court-martial acts only in response to the call of a superior authority, and that the result of its deliberations is somewhat in the nature of a recommendation to that authority (1 Winthrop, Mil. Law, 632; Davis, Mil. Law, 15), is without effect unless approved by it, and until then is interlocutory and inchoate only (*Runkle v. United States*, 122 U. S. 543, 555, 7 Sup. Ct. 1141, 30 L. Ed. 1167; *Mills v. Martin*, 19 Johns. 7, 30). The superior authority which orders a court-martial, and to which its conclusion must be submitted for approval or disapproval, is spoken of as the reviewing authority. Its action being indispensable to a final conclusion or judgment, the reviewing authority is an essential component of the original tribunal, and is not entirely a court of errors. There is therefore nothing in the character of a court-martial which inherently precludes committing to the reviewing authority the determination of the character of imprisonment to be imposed within the

prescribed limits. No statute is cited, and we know of none, which makes it the duty of the court-martial, when there is a discretion to be exercised, to say whether the imprisonment shall be at a military post or in a penitentiary, and which thereby prevents the adoption of a rule or regulation committing the matter to the reviewing authority for determination. Paragraph 940 of the army regulations before quoted is a rule or regulation promulgated by the Secretary of War under authority of the President, and is not a statute. As has been shown, it was subject to modification by the authority which made it, and its modification would be competently effected and shown by the promulgation of a new or different rule or regulation upon the subject by the Secretary of War, acting under the presumed approbation and direction of the President. We think such a modification was effected and is shown by the following order or direction in the manual for courts-martial issued by the Secretary of War in 1895, and repeated in like manuals issued by him in 1898 and 1901:

"Unless the laws of the state, territory, etc., in which the court is convened, are at hand, it is impossible for the court to determine in all cases whether or not, under the 97th A. W. [article of war], the offender is punishable by penitentiary confinement. Therefore, in case of any doubt, the words 'in such place as the reviewing authority may direct,' will be used in the sentence."

This operated to ingraft upon paragraph 940 of the army regulations a proviso to the effect that where imprisonment is prescribed by the sentence, and it is impossible for the court-martial to ascertain whether, under the local law, the offense may be punished by imprisonment in a penitentiary, the court shall leave the determination of the character of the confinement—whether at a military post or in a penitentiary—to the reviewing authority. The sentences now under consideration conformed to this direction, and, as completed by the reviewing authority, fully comply with the requirement of paragraph 940, as modified.

Counsel for the petitioners earnestly insists that the order or direction in the manual for courts-martial should be entirely disregarded, for two reasons: First, that it is a mere footnote, and not a part of the text; second, that the manual is simply a suggestion as to procedure under military law prepared by the Judge Advocate General for the "information and guidance" of courts-martial, and approved by the Secretary of War, without the approbation or direction of the President, and that therefore it cannot affect a regulation issued by direction of the President for the "government" of the army. While this insistence of counsel has been very forcefully presented, there are several considerations which preclude its adoption by us.

The order or direction is in a footnote to the manual, but an addendum or postscript to a written communication is not for that reason less authoritative than the principal text, if, upon a view of both, they appear to speak a single voice and to be a single communication. The language of this note and the general character of the manual point to a single authorship, and an intention that the note shall command respect and obedience in like manner as the body of the manual. The authorship and obligatory character of the note are also indicated by the declaration in paragraph 1552 of the army regulations of 1895 (paragraph 1761, regulations 1901) that "the standard blank forms used

in army administration, with the notes and directions thereon, have the force and effect of army regulations. * * * All notes or directions on these blanks will, prior to their issue, be approved by the Secretary of War." While this note is not upon a blank form, it is in a standard publication of the War Department, and appears under a portion of the text which prescribes the manner of indicating the character of imprisonment imposed by the sentence of a court-martial. The note is clearly a part of the manual, and intended to have the same force and effect as the principal text.

It is true that in the order promulgating the army regulations the Secretary of War states that they are published by direction of the President for the "government" of all concerned, and that in the order promulgating the manual for courts-martial the Secretary of War makes no reference to the President, but states that the manual is published for the "information and guidance" of all concerned. The difference is one of words only. In legal contemplation, the two orders speak by the same authority, and the relation of that authority to those whose conduct is intended to be affected makes what is said a command in each instance. An officer or soldier would see no difference between being governed by a stated regulation issued by his superior, and being guided by such a regulation. Both orders are signed by the Secretary of War, and neither by the President. Both depend upon the character of the act done, and the authority of the Secretary to represent and speak for the President, rather than upon the presence or absence of any direct statement of the President's approbation of the Secretary's action. The express statement of the Secretary in one order that he acts at the President's direction is not stronger than the implied statement to the same effect in the other, because the authority of the Secretary of War to speak at all, in respect of the matters covered by the army regulations, or those covered by the manual, depends upon the fact that he represents and speaks for the President. Repeated decisions of the Supreme Court, and superior reason as well, forbid any presumption that the Secretary of War, in publishing the manual, acted without the approbation or direction of the President, and intended, independently of the President's will, to inform courts-martial that paragraph 940 of the army regulations, published for their government at the President's direction, could be disregarded, and to guide them to an incomplete and wrongful discharge of official duty. Yet that would clearly be the effect of acceding to the claimed difference between the authority of the army regulations and that of the manual for courts-martial. The rational presumption, and the one which is sustained by judicial precedents, is that in publishing to the army the manual for courts-martial of 1895, and in republishing it in 1898 and 1901, the Secretary of War was not assuming a power which he did not possess, or to act without the approbation or direction of the President, but, as the recognized and legitimate organ of the President, was expressing his competent direction or order in a matter affecting the administration and government of the army. *United States v. Eliason*, 16 Pet. 291, 301, 10 L. Ed. 968; *United States v. Fletcher*, 148 U. S. 84, 89, 13 Sup. Ct. 552, 37 L. Ed. 378. It is otherwise shown that this manual is a supplemental set of rules or regulations established under

the President's direction, and having special reference to courts-martial. As such they are deemed part of the regulations for the army. Digest Op. Judge Advocate General (Ed. 1901) pp. 747, 751. Paragraph 938 of the army regulations of 1895 (paragraph 1039, regulations of 1901), conceded to emanate from the President, directs:

"Whenever by any of the articles of war punishment is left to the direction of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the manual for courts-martial, published by authority of the Secretary of War."

This is a recognition of the authoritative character of the manual.

In the case of Oberlin M. Carter, which has been before the courts several times, there was a conviction upon one charge expressly punishable by dismissal from the army, and upon two charges punishable by imprisonment either at a military post or in a penitentiary. The sentence of the court-martial, in respect of the imprisonment, was "to be confined at hard labor at such place as the proper authority may direct for five years." The President was the reviewing authority, and, upon the approval of the sentence, caused the Ft. Leavenworth penitentiary to be designated as the place of confinement. *Carter v. McClaughry*, 183 U. S. 365, 373, 374, 22 Sup. Ct. 181, 46 L. Ed. 236. Notwithstanding the repeated and earnest efforts of able counsel on behalf of Carter to avoid the execution of the sentence, it passed unchallenged in respect of the point presented by these petitioners. This may be entitled to only slight attention, but a fact in that case which has an important bearing upon the question now under consideration is this: A sentence pronounced and stated in conformity with the note in the manual for courts-martial was there brought directly to the attention of the President, and he exercised the discretion, reserved to the reviewing authority, of determining whether the imprisonment should be at a military post or in a penitentiary, and directed that it be in a penitentiary. That was a plain recognition of the authority of the manual and of the note.

The present cases are altogether unlike *Deming v. McClaughry*, 51 C. C. A. 349, 113 Fed. 639, and *McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049, where a practice in the army and in the executive department which was in violation of an act of Congress was not permitted to prevail in the courts against the unambiguous terms and plain meaning of the statute. Here, no statute forbidding, it was competent for the President, through the Secretary of War, to establish the rule or regulation quoted from the manual, and the only question is whether this was done. The action of the President in the Carter Case, the action of three general officers of the army in the cases under consideration, the like action of three other general officers of the army shown in *In re Langan* (C. C.) 123 Fed. 132, and the knowledge of such action, and concurrence therein, of the Secretary of War and the Judge Advocate General, which are also indicated in these several cases, show that the manual for courts-martial and the note named have been so generally and uniformly recognized and given effect as parts of the regulations for the army, both by those who make and publish those regulations and by those who execute them, that any doubt or uncertainty as to the character or force of the manual or its

note ought certainly to be resolved in favor of sustaining this established practice and uniform action. *United States v. Hill*, 120 U. S. 169, 182, 7 Sup. Ct. 510, 30 L. Ed. 627; *Deming v. McClaughry*, 51 C. C. A. 349, 351, 113 Fed. 639; *In re Langan* (C. C.) 123 Fed. 132; *United States v. Tanner*, 147 U. S. 661, 663, 13 Sup. Ct. 436, 37 L. Ed. 321; *Webster v. Luther*, 163 U. S. 331, 342, 16 Sup. Ct. 963, 41 L. Ed. 179.

Whether, within the meaning of the rule or regulation prescribed in the manual, the local law was impossible of ascertainment by the court-martial, was in each instance a question for the court-martial to determine, and the form of their sentence shows that they resolved it in the affirmative. The presumptions in favor of official action are such as to make the sentence conclusive upon this matter, and to preclude collateral attack. *In re Chapman*, 166 U. S. 661, 671, 17 Sup. Ct. 677, 41 L. Ed. 1154; *Carter v. McClaughry*, 183 U. S. 400, 22 Sup. Ct. 181, 46 L. Ed. 236.

The sentences were lawful, and the writs of habeas corpus are discharged.

(128 Fed. 890.)

BRITISH AMERICA ASSUR. CO. v. DARRAGH.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1904.)

No. 1,262.

1. INSURANCE—ARBITRATION—RIGHT TO SUE.

Where a fire insurance policy provided that in the event of a disagreement as to the amount of the loss the loss should be ascertained by appraisers, and after loss an agreement was made, in which the only thing submitted to arbitration was the extent of the damage, the insurer's liability being expressly reserved, such arbitration agreement was no bar to insured's right of action on the policy.

2. SAME—COLLATERAL AGREEMENT.

Where a fire policy provided for arbitration only in the event of a disagreement as to the amount of the loss, and after loss, but before there had been any attempt to agree on the amount thereof, it was agreed to submit the amount of the loss to arbitration, such agreement was a substantial departure from and independent of the policy, and avoided the effect of the policy provision.

3. SAME—ATTEMPT TO ARBITRATE—TERMINATION—ESTOPPEL.

Where, after loss under a policy, and before any disagreement as to the amount thereof, the parties agreed to submit the loss to arbitration, and two arbitrators were appointed, but the arbitration failed by reason of the withdrawal of insured's arbitrator because of the failure of the arbitrator appointed by insurer to act with reasonable dispatch, and insurer failed to object to such withdrawal, it was estopped from thereafter insisting that insured was barred by such abortive arbitration from suing on the policy.

¶ 1. Conditions of insurance policy as to arbitration, see notes to *Mutual Fire Ins. Co. v. Alvord*, 9 C. C. A. 628; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 30 C. C. A. 389.

See Insurance, vol. 28, Cent. Dig. § 1431.

4. SAME—UMPIRE—DELEGATION OF AUTHORITY.

Where an umpire was appointed to determine disagreements between arbitrators appointed to determine an insurance loss, such appointment was a personal trust, and it was therefore improper for him to base his conclusions on facts reported to him by one of his employes.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Chas. P. Cocke, W. W. Howe, John Clegg, and Lamar C. Quintero, for plaintiff in error.

Harry H. Hall, for defendant in error.

Before McCORMICK and SHELBY, Circuit Judges, and SPEER, District Judge.

SPEER, District Judge. In August, 1901, Mrs. J. L. Darragh secured from the plaintiff in error and other insurance companies insurance on her sugar house and machinery on Justine plantation in parish of St. Mary. The aggregate amount insured by the several policies was \$42,000. In December of the same year the sugar house and machinery of Mrs. Darragh were destroyed by fire. The insurance not having been paid, an action was brought in the Circuit Court for the Eastern District of Louisiana on the policy of the plaintiff in error, it being agreed between counsel for the litigant parties that one case should be tried, and thus determine the controversy.

The ground of defense is based upon a clause of the policy, which is as follows:

In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss."

It does not appear from the evidence that there was any effort to reach an agreement as to the amount of loss, or that there was any disagreement between Mrs. Darragh and the insurance companies on this subject. On January 10, 1902, Mrs. Darragh and Mr. Cooke, who represented the insurance companies, signed what is termed a "non-waiver agreement." The effect of this paper may be gathered from its last clause:

"The Intent of this agreement is to preserve the rights of all parties hereto, and provide for an investigation of the fire and the determination of the amount of the loss or damage, without regard to the liability of the party of the first part."

It appears from this, and otherwise throughout the record, that at no time did the insurance companies admit liability. On the same day on which the "nonwaiver agreement" was made Mrs. Darragh and the insurance companies entered into the following agreement:

"That A. F. Slingerup and A. N. Hadley shall appraise and ascertain the sound value of and the loss upon the property damaged and destroyed by the fire of the 23rd of December, 1901, as specified below.

"Provided, that the said appraisers shall first select a competent and disinterested umpire, who shall act with them in matters of difference only.

"The award of any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss.

"It is expressly understood that the said agreement and appraisalment is for the purpose of ascertaining and fixing the amount of sound value and the loss and damage only to the property hereinafter described, and shall not determine, waive or invalidate, any other right or rights of the parties to this agreement.

"And it is further expressly understood and agreed that, in determining the sound value and the loss or damage upon the property hereinbefore mentioned, the said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof, at and immediately preceding the time of the fire; and in case of depreciation of the property from use, age, condition, location, or otherwise, a proper deduction shall be made."

Four days later, namely, on January 14th, Slingerup and Hadley were sworn as appraisers, and they selected Lewis Johnson, of New Orleans, to act as umpire "to settle matters of difference that exist between us by reason of and in compliance with the foregoing agreement and appointment." When Mrs. Darragh brought her action, this last agreement was relied upon by the insurance company as a bar to her right of action. An exception, as it is termed under the Louisiana practice, or plea in bar, as it might be termed elsewhere, was presented setting out this defense. An issue having been joined on this plea, evidence was submitted, and the jury, under the instructions of the court, found the plea bad. The action then proceeded before another jury, and after full hearing a verdict was rendered for the plaintiff in the court below against the defendant company for \$5,000—that being the full amount of the policy. Under the agreement between the parties, this verdict, if sustained, will entitle Mrs. Darragh to recover upon the several policies the full amount of the insurance thereby granted, aggregating \$42,000. After verdict and judgment on the last trial, the plaintiff in error sued a writ of error to this court, not to the action of the court and jury on the last trial, but to the verdict and judgment on the first trial involving the plea in bar.

There are numerous exceptions, but they all depend on the determination of this question: Under the facts of this case, was the plaintiff debarred from prosecuting her remedy at law to have the liability of the insurance companies determined, and to recover insurance for the loss which she had sustained, because of the stipulation for an appraisalment in the policy above set forth, or because of the agreement to submit to Slingerup, appointed by the insured, and Hadley, appointed by the insurers, and Johnson as umpire, the question of loss which the insured had sustained? Whatever may be the effect, generally, of a stipulation in a policy of insurance providing for an appraisalment of the loss sustained, in which it is also stipulated that no right of action shall inure to the insured until the appraisalment has been made, it is quite clear to the court, under the facts of this case, that the agreement upon which the plaintiff in error here relies cannot be regarded as a bar to Mrs. Darragh's right of action. At no time did the defendant companies admit their liability, and as late as February 15, 1902, the general agents of several of the insurance companies wrote to Mrs. Darragh, as follows:

"As a matter of fact, we are not in position, at this time, to admit any liability whatever, under the policies; we are not in possession of all the facts,

but from information which we have received, we have been led to believe that the companies are not liable."

The agreement for particular persons to arbitrate into which Mrs. Darragh and the plaintiff in error entered was expressly restricted to the ascertainment of sound value and loss and damage only, and the rule is clear that "where it is agreed that an award shall have no reference to any other question than the estimate of damage done, the assured properly brings an action on the policy, and not on the award." May on Insurance (4th Ed.) § 493. Mrs. Darragh all the while was pressing for the collection of her insurance. Even had the award been made, there was no reason why her proceeding at law should have been barred. Said the Supreme Court of Massachusetts in *Soars v. Home Insurance Company*, 140 Mass. 345, 5 N. E. 149:

"The award has reference merely to the damages. The agreement of submission merely refers to arbitrators, the appraisal and estimate of the damage by fire to the plaintiff's property, and expressly provides that the award shall have no reference to any other question or matter of difference, and shall be 'of binding effect only so far as regards the actual cash value or damage to such property.' A valid award under this submission might be evidence of the damages in any action upon the policy; but it is too clear to admit of any discussion that the only action of the plaintiff must be upon the policy, and not upon the award."

There are, however, infirmities of even more gravity in the case of plaintiff in error. The policy provides for arbitration only in the event of disagreement as to the amount of loss. It appears neither from the evidence nor from the agreement actually made that there had been any disagreement on this subject. The agreement to arbitrate actually signed provided therefore for an independent arbitration in anticipation of a possible disagreement. This clause of the policy provides that "the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage." The agreement signed provides, in addition to this, that "the said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof at and immediately preceding the time of the fire; and in case of depreciation of the property from use, age, condition, location, or otherwise, a proper deduction shall be made." Now, a stipulation in a standard policy like that on which action is brought, by which it is sought to deprive the insured of her right of action, is in derogation of common right, and under the familiar rule will be strictly construed. It follows that any substantial departure therefrom will make the agreement in which such departure appears collateral with and independent of the policy, and will avoid the effect of the latter instrument. It is to close the doors of the courts to the insured whose property has been damaged or destroyed.

But, had this agreement to arbitrate the loss been in strict accordance with the terms of the policy, it cannot, under the facts of this case, be regarded as a bar to Mrs. Darragh's right of action. It is very clear from the evidence submitted to the jury that not only was there no appraisal of the loss sustained, but that nothing was done which can be regarded as an attempt in good faith to make such an appraise-

ment. A portion of the oral evidence upon this point was in conflict. This conflict was for the jury, and by their verdict they have settled it in favor of Mrs. Darragh. Much evidence was submitted in writing. This was in the form of letters written by the appraiser, parties, and their agents and attorneys, while the matter was pending, dum ferret opus. All the while Mrs. Darragh is urgent for the action of the appraisers. On January 27, 1902, her attorney, Mr. Charles O'Neil, writes to the adjuster of the various insurance companies:

"Mr. Hadley, the appraiser representing the insurance companies, has gone to Mexico, without submitting his estimates, and although he expects to return within two weeks, it may be that he will be away longer. We are not willing to wait indefinitely, especially without knowing whether you intend to deny liability or not.

"Mrs. Darragh's mortgage creditor is interested in these policies and the delay in their settlement has caused and is still causing severe annoyance and loss to Mrs. Darragh."

Two days later the adjuster answers this earnest letter as follows:

"Replying to your oracular letter of the 27th inst., I beg leave to say that we know of no condition of our contracts requiring answer, at this time in any event, to your various queries. Expressly reserving all of our rights, and without waiver of any description, we remain, yours respectfully."

On February 3, 1902, Slingerup, one of the appraisers, writes to Mrs. Darragh, through her agent, Mr. M. F. Tiernan:

"Dear Sir: I have earnestly endeavored to get Mr. Hadley to arrive at some reasonable agreement as to the value and losses of your sugar house and machinery, but he was too busy while in this city with his own business, that of purchasing of machinery for Mexico, that he could devote very little time, in fact, the only thing that he did was to figure out the loss of the building, which was so radically wrong, that I was compelled to employ a builder to figure out the lumber and cost of the building. In order to get at anything like the value and loss we visited Justine plantation (as you know), arriving there on a Saturday, and Mr. Hadley left Justine on Sunday at noon for Mexico.

"As it is impossible to know when he will return, and, as it will be impossible for me to be in readiness at any time that it may suit Mr. Hadley's convenience to come here, for this reason I ask you to relieve me of any further connection with this appraisalment."

On February 15th, as we have seen, the insurance companies wrote a letter, in which they state substantially that they deny liability, and on February 20th the adjuster above mentioned, a Mr. Cooke, wrote to Mrs. Darragh a letter which contains the following statement:

"I note that your appraiser has withdrawn; he should not have been appointed. You have the right to now name a competent and disinterested appraiser in his stead."

On March 3d Mrs. Darragh replied to Mr. Cooke as follows:

"I have your favor of February 20th inst., suggesting that in view of the refusal of Mr. Slingerup to act further as an appraiser, I have the right to name a competent and disinterested appraiser in his stead. I have been subjected to so much annoyance and delay in the matter of this appraisalment, and have been so impressed by the failure of the appraisers agreed upon to reach any result, that I am unwilling to proceed further under our agreement.

"Mr. Slingerup refuses to devote any more of his time to the matter, and has resigned, and Mr. Hadley has gone to Mexico.

"Our agreement was to submit to these two men. There is no general agreement to submit to any one else. I signed at the same time, a non-waiver agreement.

"I now decline to make any new agreement to arbitrate, and withdraw my non-waiver agreement. You have my proofs of loss which I assume to be satisfactory. You have the right under the policy to call for an appraisal in case of disagreement as to the amount of loss. Should you make such demand, I shall cheerfully comply with it."

From all of this it appears that not only was there no appraisal and no disagreement, but that, before his duties were well entered upon, Mrs. Darragh's appraiser withdrew, and that his withdrawal was not objected to by the defendant companies. This, in our judgment, estops them from now insisting that this abortive and imperfect arbitration should conclude the rights of the insured. But even then Mrs. Darragh makes it clearly to appear that, while she will no longer assent to an independent arbitration like that which has given her so much trouble, she yet recognizes the rights of the insurers to call for an appraisal under the policy in case of disagreement as to the amount of loss; and even at this late day she says, "Should you make such a demand, I shall cheerfully comply with it." Slanderup, Mrs. Darragh's arbitrator, at this time was dying of cancer of the throat. He died, indeed, before the action was tried. His testimony, which the jury accepted as true, must have been given by him with full knowledge of approaching dissolution. He testifies plainly and unmistakably to the effect that the duties of the appraisers were never performed before his withdrawal, and that there had been no such disagreement as would have justified the appearance and action of the umpire. It further appears that, notwithstanding the earnest objections of Mrs. Darragh to his withdrawal, it was compelled by the conduct of the appraiser for the plaintiff in error. Notwithstanding all of this, thereafter Mr. Hadley, the arbitrator for the insurance companies, and Mr. Johnson, the umpire, reached an agreement as to the amount of loss, which is nearly ten thousand dollars less than the agreed value of the property insured and the amount of the insurance appearing on the face of the policies. It is to be observed that at the time this action was taken and this estimate made Mrs. Darragh had no appraiser, and her interests were not represented in any manner. It is to be further observed that the appointment of Mr. Johnson as umpire was a personal trust, and, if all else had been regularly done, this would have required his personal participation in the ascertainment of the loss sustained. But Mr. Johnson was otherwise engaged, and sent one of his employes to make a report upon which his own conclusions were based. It is not by proceedings of this character that Mrs. Darragh can be debarred her constitutional right to seek established justice by suitable application to the court having jurisdiction.

The exceptions having been confined to the trial of the plea in bar, no exceptions or assignments of error having been presented on the trial of the case upon its merits, and no error appearing in the action of the court or in the verdict of the jury, the judgment of the Circuit Court is affirmed.

(128 Fed. 896.)

GREEN BAY & M. CANAL CO. v. NORRIE.

(Circuit Court of Appeals, Second Circuit. March 2, 1904.)

No. 100.

1. DECREE—CONSTRUCTION—SUPERSEDEAS—PROHIBITORY INJUNCTION—VIOLATION.

In an action to recover water rights in certain ponds, plaintiff prayed judgment that defendant be commanded to rebuild and restore the embankment and drain on the south bank of the river, opposite the property conveyed by plaintiff to the United States with a reservation of the water power. The state court rendered judgment that plaintiff was the owner of the water power created by the dam previously erected, and adjudged that defendant be perpetually restrained from drawing any water from the pond created by the dam. On appeal, it appearing that defendant, instead of the earth embankment, had constructed a series of stone piers, with openings between the same which could be closed by movable gates, and which, when closed, operated to maintain the pond, the court held that, as defendant's headgates would stop the water as effectually as would an embankment, the plaintiff was not injured by leaving the gates, and that the refusal of the injunction as prayed was a proper exercise of the trial court's discretion. *Held*, that the injunction contained in the judgment of the state court was prohibitive only, and not mandatory, and was therefore not suspended by a supersedeas bond given on appeal to the United States Supreme Court, where the judgment was affirmed.

2. SAME—ESTOPPEL.

The fact that both parties to a suit mistakenly supposed that a supersedeas bond on an appeal from the Supreme Court of the state to the United States Supreme Court operated to suspend a prohibitory injunction did not estop one of the parties from contending, in an action on the bond, that such was not its effect.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 118 Fed. 923.

This cause comes here upon writ of error to review a final judgment of the Circuit Court, Southern District of New York, dismissing plaintiff's amended complaint on the merits, upon demurrer thereto for insufficiency of facts. The action is at law upon a federal statutory supersedeas bond in the penal sum of \$30,000, given by defendant and three other co-sureties upon a writ of error to the Supreme Court of the United States to review a final judgment entered in the circuit court of Outagamie county, Wis., in a suit in which the Green Bay & Mississippi Canal Company was plaintiff and the Kaukauna Water Power Company was defendant. In the Wisconsin suit it was contended that a certain pond, from which the Kaukauna Company was drawing water power for the use of some mills which it operated (or leased) on the banks of the Fox river, was part of a system of ponds and canals maintaining slack-water navigation on said river, originally owned by the plaintiff; that the same had been conveyed by plaintiff to the United States, with reservation of "the water powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto"; that a necessary part of such work was an embankment across the river front of "lots 6 and 7, where they abut on Fox river, of the height of eight or ten feet, and of sufficient thickness and strength to hold the water in said pond"; that the maintenance of such embankment across said lots was necessary to the maintenance of plaintiff's water power; and that the Kaukauna Company had "cut, broken, torn away, and removed the embankment along and on said lot 6 for the space of about 200 feet." Plaintiff prayed judgment against the Kaukauna Company, commanding it "to rebuild and restore to its former state and condition the embankment

and drain on said south bank of said river upon and across said lot 6." The Wisconsin action was tried in the circuit court, was appealed to the Supreme Court of that state, and upon mandate of the latter court there was entered the final judgment in said circuit court, from which the appeal was taken to the United States Supreme Court, and the bond here sued upon was executed. That judgment "considered and adjudged that the plaintiff is the legal owner of the water power created by such dam [describing it] over and above what is required for navigation." It adjudged \$193.22 costs to plaintiffs, and ordered and adjudged that defendants, the Kaukauna Company and others, "be, and they hereby are, perpetually restrained from drawing any water from the pond maintained by the dam across the Fox river, * * * mentioned in the complaint, for hydraulic power." The supersedeas bond is in the usual form; the condition being "that if the said defendants above named shall prosecute their writ of error to effect and answer all damages and costs, if they shall fail to make their plea good, then the above obligation to be void." The judgment appealed from was affirmed by the United States Supreme Court, without any modification. *Kaukauna Co. v. Miss. & Green Bay Co.*, 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004. It seems to have been supposed by all parties that the supersedeas bond operated to suspend the injunction, and the Kaukauna Company, during the pendency of the appeal, continued to draw water from the pond for hydraulic power, without interference or objection, and without any application being made to the court to punish it for disobedience of the injunction. The action at bar is brought to recover damages for such continued drawing of the water.

Moses Hooper, for plaintiff in error.

T. N. Rhinelander, for defendant in error.

Before LACOMBE and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Demurrer was interposed to the original complaint, and the points raised thereby were discussed by Judge Townsend in an opinion reported in 118 Fed. 923. He referred to *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888, and *Leonard v. Ozark Land Company*, 115 U. S. 465, 6 Sup. Ct. 127, 29 L. Ed. 445, and held that a supersedeas does not suspend the effect of a prohibitory injunction pending appeal. The plaintiff in error here does not question the correctness of that conclusion; so it will be sufficient, on that branch of the case, to refer to Judge Townsend's opinion. That opinion contains the following:

"The parallel which the plaintiff seeks to draw between an action in ejectment and a bill in equity for an injunction fails, for the reason that the judgment in ejectment is such as to entitle the plaintiff prevailing to have the process of the court upon that very judgment carried out affirmatively until the party in possession is actually removed. A supersedeas in such case stays the active force of the judgment. An injunction, on the contrary, does not of itself change the status, or go further than to pronounce upon the rights of the parties and forbid the doing of acts inconsistent with those rights."

The plaintiff, in the hope that it might thereby convince the court that its situation was similar to that of the successful plaintiff in ejectment, amended its complaint by setting forth the locus in quo and the proceedings in the Wisconsin courts in much greater detail. It is now contended that the injunction was not merely prohibitory, but mandatory as well; that by the decision of the Wisconsin court "in effect it was adjudged that the canal company was the owner of the water power, and that possession thereof should be taken from the Kaukauna Company and transferred to the plaintiff."

If the injunction were in fact mandatory, it would be suspended by the appeal and supersedeas; but the argument of plaintiff in error fails to convince us that it is not purely prohibitive. Manifestly it is prohibitive in form. It perpetually enjoins and restrains from drawing any water from the pond for hydraulic power. It is to be noted that the embankment and the headgates which the Kaukauna Company had placed therein were located wholly on property of that company, and the judgment did not profess even to put the canal company into possession of, or in control of, either. All that it was adjudged the plaintiff owned was the right to have the surplus water from the pond flow onward to his premises without being reduced in volume by drafts of the Kaukauna Company. In a purely technical sense only could it be said that the judgment put him into possession of the water power. Moreover, not only is the form of injunction prohibitory, but that form was selected by the court *ex industria*.

It will be remembered that the bill prayed that the Kaukauna Company be commanded "to rebuild and restore to its former state and condition the embankment and drain." This was a specific prayer for a mandatory injunction. The complaint in the present action shows that the works of the Kaukauna Company consisted of a series of stone piers, with openings between the same, and with movable gates or slides to close such openings, so that, when such slides or gates were closed, the same operated to maintain the mill pond; this constituting what may be termed a substituted embankment, in place and stead of the original earth embankment. Upon the trial of the action in the Wisconsin circuit, that court found that:

"In building its canal, the Kaukauna Company has erected and maintained works on the south shore of the river that does the same service that was performed by the embankment mentioned in the deed from John Hunt."

And upon appeal the Supreme Court of Wisconsin said:

"Inasmuch as the headgates to the defendant's canal stop the water as effectually as would an embankment of earth, and the plaintiff is not injured by leaving the gates as they are, a refusal of the injunction prayed is a very proper exercise of the discretion of the court."

In view of this, we fail to see how it can be maintained that the prohibitory injunction which was granted was in fact, or was intended to be, the mandatory injunction which was refused.

It is further contended that because, prior to the decision in the Wisconsin court, the water was being drawn from the pond through the open gates, the injunction must be construed to be mandatory, as well as prohibitory, on the ground that it first required the gates to be closed, and thereafter to be kept closed. In our opinion, this distinction is too fine drawn for practical application. The important and controlling feature of the injunction is the compelling of the defendant to refrain in the future from doing the acts complained of. It is not concerned with what he may or may not do to enable himself to comply with this command thereafter to refrain. It would be a curious rule of construction which would hold an injunction against the use of machinery, for instance, embodying some patented improvement, to be mandatory if it were served during working hours, when

the machinery was in motion, and prohibitory only if it were served at night or during the midday recess, when the machinery was at rest.

We find no force in the suggestion of an estoppel resulting from the circumstance that all parties mistakenly assumed that the supersedeas stayed the operation of the injunction.

The judgment of the Circuit Court is affirmed.

(127 Fed. 550.)

COPELAND et al. v. BRUNING.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1904.)

No. 984

1. FEDERAL COURTS—ENJOINING SUITS IN STATE COURTS—GROUNDS AUTHORIZING.

In a suit in a federal court involving property which had been left by the will of the owner in trust for the benefit of the complainant, a decree was entered on a cross-bill ordering the sale of the property to satisfy a mortgage therein given by complainant to defendant, and directing that the surplus be paid to the trustees named in the will. Prior to the sale, complainant brought suits in a state court, praying for an accounting by such trustees and for their removal. *Held*, that such suits did not interfere with any property over which the federal court acquired jurisdiction which warranted the federal court in enjoining their prosecution.

Appeal from the Circuit Court of the United States for the District of Indiana.

The appeal is from a decree of the Circuit Court, enjoining appellants from further prosecution of two certain suits in the Circuit Court of Jefferson County, Indiana, and grows out of the following facts:

Under the will of John F. Bruning, father of appellant Clara Copeland and appellee William B. Bruning, part of the estate disposed of was devised to William B. Bruning absolutely, and part to him and one Horuff as trustees for the appellant. The trust expressed in the will is as follows:

"I bequeathe and devise all that part of my real estate of which I may die the owner, described as follows [describing the real estate now in litigation]: to my son William H. Bruning and Nicholas Horuff, trustees, and to the survivor of them and their successor or successors in said trust, upon trust, during the period of the married life of my daughter Clara, wife of William M. Copeland, and to apply the whole of the annual income, after paying taxes, insurance and necessary repairs, of said trust premises, for or toward the support and benefit of my said daughter and her husband. * * * When my said daughter shall become a widow; or when she, her husband and my son William H. Bruning shall jointly by an instrument in writing request said trustees or the survivor of them, or their successor or successors in said trust, to convey and transfer any portion or all of said trust property to my said daughter, Clara Copeland, said trustees shall in such event at once convey the same to her in fee simple by deed, in which said written request shall be recited; and such deed of conveyance shall vest the title to the real estate so conveyed to her in fee simple, free from said trust.

"But if my said daughter Clara should die after my decease and during the lifetime of her husband, William M. Copeland, without leaving issue alive, then my trustees aforesaid, or their successor or successors in said trust, shall convey said trust property to my son, William H. Bruning, in fee simple; and if

¶ 1. Federal courts enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575, and note at end of case.

my said daughter should die in my lifetime and during the lifetime of her husband, or during her widowhood, without leaving issue alive at my death, then the said real estate, devised in this item upon trust for her, shall vest in my son, William H. Bruning, at my death, and I devise it to him accordingly. Should, however, my said daughter leave issue alive at the time of my death, in either of the foregoing events of her death, then such issue shall take such devise to her by way of representation."

Appellant Clara Copeland, being dissatisfied with this portion of the will, and having taken steps toward testing its validity, an arrangement between them was reached under which the brother advanced some money, the sister executing to him a deed of the property then in trust. Subsequently a suit was begun by the sister in the Circuit Court of the County of Jefferson, Indiana, for partition of the estate of her father, as if no will had been made and no deed executed, which suit was removed by appellee into the Circuit Court of the United States. Thereupon appellant amended the petition so as to include the transaction respecting the deed, charging that such deed was in the nature of a mortgage to secure the advances made to her by her brother, and asking, that upon the payment of such advances, the deed be cancelled, and the partition asked for take place.

To this appellee filed a cross bill, bringing into the case the will, admitting that the deed was a mortgage, and asking for the sale of the interest devised to Clara Copeland, to satisfy such mortgage. Subsequently the will was probated, and a supplemental cross bill filed bringing that fact into the record.

Thereupon, after hearing, the Circuit Court appointed a receiver, to whom appellee was required to account for rents and profits during the time the property of appellant was in his possession; and a decree entered establishing the debt of appellee. To satisfy this decree a sale was ordered, with provision that if out of the proceeds of the sale, there appeared to be any sums over and above the debt and costs of suit, the same should be paid to the trustees of Clara Copeland under the will.

The sale was originally ordered for the 27th of December, 1902, to take place at Madison, the County Seat of Jefferson County, but owing to a defect in the advertisement, the sale was postponed until the 31st day of January, 1903.

December 27th, 1902, appellants began in the Circuit Court of Jefferson County, two suits in substance asking for an accounting from the trustees named in the will; the removal of such trustees; and the appointment of new ones. It was not shown that anything was done by appellants in furtherance of their suits, other than to begin them. But, by petition of appellee, they were brought to the notice of the United States Circuit Court, and after hearing, a decree was entered, enjoining appellants, their agents and attorneys, from further prosecution of the suits; from which decree this appeal was taken.

The further facts are stated in the opinion of the court.

Smiley N. Chambers, for appellants.

Ferdinand Winter, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court:

It is said in maintenance of the injunctive order appealed from, that the suits enjoined were an attempt to interfere with the corpus of the property in the hands of the federal court; and, to establish this proposition, it is urged that the debt found due, with costs of suit, are more than enough to exhaust the property, to foreclose the lien on which the decree was entered. These facts, it is urged, constitute an extinguishment of the trust.

But no such fact was in the record at the time the decree was entered. The sale had not yet taken place, and it was not known that there would be no surplus. Indeed, provision for surplus was made

in the decree to be paid over to the trustees under the will. The suits in the state court related, among other things, to such surplus, and to that extent, at least, lay outside the jurisdiction of the federal court.

But it is said the suits in the state court were not limited to such surplus—that in effect, they challenged the decree of the federal court under which the debt was established and the accounting settled. Let this be admitted; even then the injunction is not justified, for to the extent that the subject matter of the suit in the state court was already settled by former adjudication, the defense should have been by plea in the court where the suits were brought, and not by injunction in another jurisdiction. No possession of the res was involved, and no conflict of courts could have followed, that would have affected the decree in the United States Court.

Though it was so argued, the facts of this case do not show that the commencement of the suits in the state court was in the nature of vexatious interference with the execution of the federal court's decree. Other than the mere filing of the complaints, no step was taken or threatened. The restraining decree under consideration did not undo what had already been done. The suits still remained as they were before the decree was entered. We cannot see how their prosecution could have added any further cloud to the title, or have tended to prevent persons having a mind to purchase, from attending the sale or bidding on the property. No element of vexatious interference of any kind, is apparent.

The decree must be reversed.

NOTE.¹

Enjoining Proceedings in State Courts.

I. IN GENERAL.

[a] (U. S. 1899) The fact that a proceeding by mandamus is pending in a state court to compel a city and its board of valuation and assessment to certify the apportioned valuation of a bank for purposes of taxation does not render a suit subsequently instituted by the bank, to restrain the city and the board of valuation from taking this action, a suit to enjoin the proceedings in a state court. Decree (C. C. 1898) *Bank of Kentucky v. Stone*, 88 Fed. 383, affirmed.—*Stone v. Bank of Kentucky*, 19 Sup. Ct. 881, 174 U. S. 799, 43 L. Ed. 1187.

[b] (U. S. 1900) An injunction against enforcing claims against Indians in a state court cannot be granted by a federal court under Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], which prohibits an injunction from a federal court to stay proceedings in any court of a state except in matters of bankruptcy.—*United States v. Parkhurst-Davis Mercantile Co.*, 20 Sup. Ct. 423, 176 U. S. 317, 44 L. Ed. 485.

[c] (U. S. 1899) A Circuit Court of the United States cannot enjoin the further prosecution of a suit in a state court on the ground that such suit has been removed to the federal court, from which the injunction is sought, where, though a petition and bond for removal have been filed, no action thereon has been taken by the state court, nor has any copy of the record been entered in the federal court.—*Cœur D'Alene Ry. & Nav. Co. v. Spalding*, 93 Fed. 280, 35 C. C. A. 295.

[d] (U. S. 1899) Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the granting of an injunction by a court of the United States to stay proceedings in any court of a state, except where authorized in bankruptcy proceedings,

¹ Supplemental to notes in *Garner v. Second Nat. Bank*, 16 C. C. A. 90, and *Central Trust Co. v. Grantham*, 27 C. C. A. 575.

applies to injunctions directed to parties engaged in proceedings in the state court.—*Cœur D'Alene Ry. & Nav. Co. v. Spalding* 93 Fed. 280, 35 C. C. A. 295.

[e] (U. S. 1899) A judgment creditor of a railroad company, whose cause of action arose after a sale of its road by a federal court in foreclosure proceedings, and who is seeking by a suit in a state court to enforce his judgment against the road under a state statute, cannot be said to be asserting rights claimed under any party to the decree of the federal court, so as to be bound by such decree; and that court cannot, in view of Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], enjoin him from maintaining such suit in the state court, nor can it compel him, by supplementary proceedings instituted by the purchaser of the road, to submit his rights to that court for adjudication. Decree, *Central Trust Co. of New York v. Western N. C. R. Co.* (C. C. 1898) 89 Fed. 24, modified.—*James v. Central Trust Co. of New York*, 98 Fed. 489, 39 C. C. A. 126.

[f] (U. S. 1901) Under Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], providing that, except when authorized by a bankruptcy law, "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state," a federal court is not authorized to enjoin a receiver, appointed by a state court having concurrent jurisdiction of the subject-matter, from acting under such appointment, where no priority of jurisdiction by the federal court is claimed, on the ground that the state court was without jurisdiction to make the appointment; nor is it material that the state court had, through its receiver, obtained only constructive, but not the actual, possession of the property. Decree, *Mutual Reserve Fund Life Ass'n v. Phelps* (C. C. 1900) 103 Fed. 515, reversed.—*Phelps v. Mutual Reserve Fund Life Ass'n*, 112 Fed. 453, 50 C. C. A. 339.

[g] (U. S. 1898) Where a federal court by its decree of sale retains jurisdiction of a foreclosure proceeding so far as to determine and enforce, against the property sold, claims for liability incurred by the receivers, it may enjoin the prosecution of an action on such a claim in a state court without violating Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], which inhibits granting an injunction to stay proceedings in a state court.—*Fidelity Ins., Trust & Safe Deposit Co. v. Norfolk & W. R. Co.*, 88 Fed. 815.

[h] (U. S. 1898) Under Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], a federal court has no power to enjoin the maintenance of an action in a state court on the ground that it has in a former action between the same parties adjudicated the questions involved, where the state suit is on a different cause of action; the effect of the federal judgment as an estoppel in such case being a matter of evidence which the state court has the right to determine, its judgment, if it fails to give due faith and credit to the federal judgment, being reviewable by the Supreme Court of the United States.—*Chicago, R. I. & P. Ry. Co. v. St. Joseph Union Depot Co.*, 92 Fed. 22.

[i] (U. S. 1899) Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the granting of an injunction by a federal court to stay proceedings in any court of a state except in bankruptcy proceedings, does not apply where the proceedings sought to be stayed are before a body which is not legally a court, and the fact that it is denominated a "court," and alleged to be one, does not preclude the federal court from determining that question, where it has not been authoritatively determined by the courts of the state.—*Western Union Tel. Co. v. Myatt*, 98 Fed. 335.

[j] (U. S. 1900) Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the issue of injunctions by the federal courts to stay proceedings in a state court, is not so far modified or repealed by section 1979 [U. S. Comp. St. 1901, p. 1262], providing that every person who, under color of any statute of any state, causes any citizen of the United States to be subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law or suit in equity for redress, as to permit a federal court to entertain a bill to restrain a county treasurer from proceeding in an action in a state court for the recovery of a judgment for a back assessment upon the personal property of complainant, although in the proceeding in which such *prima facie* case was made the requirement of due process of law was not observed, contrary to the fourteenth amendment to the United States Constitution.—*Aultman & Taylor Co. v. Brumfield*, 102 Fed. 7.

[k] (U. S. 1900) The holders of complainant's certificates being numerous, a mortuary call being due in a few days, and its payment to any other person than the association being likely to result in the lapse of many certificates and in irreparable injury to many members, besides doing serious injury to the business of the association, and causing a multiplicity of suits, and the mortuary calls being, moreover, not subject to any form of garnishment, the plaintiff is without any adequate remedy at law, and is entitled to an injunction restraining the judgment creditor and the receiver appointed by the state court from seeking to reduce the income and revenues of complainant to possession for the satisfaction of said judgment.—*Mutual Reserve Fund Life Ass'n v. Phelps*, 103 Fed. 515.

[l] (U. S. 1900) More than 60 days after judgment in an action against plaintiff in a state court, the plaintiff therein filed a supplemental petition to obtain satisfaction of the judgment by subjecting the mortuary calls and premiums thereafter to become due the defendant association; and thereupon the state court on the same day, although no notice of the petition had been served upon the association, transferred the cause to the equity docket, and appointed a receiver for the association in that state, and directed it to collect all the income and revenues of the association from its policy holders. *Held*, that the proceedings under the supplemental petition were void, and did not constitute a proceeding pending in the state court, within Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], which forbids the issue of an injunction by a federal court against proceedings in a state court.—*Mutual Reserve Fund Life Ass'n v. Phelps*, 103 Fed. 515.

[m] (U. S. 1901) The same plaintiff commenced a number of actions in a state court on insurance policies covering the same property, some of which actions were removed by the defendants into a Circuit Court of the United States. Two of such defendants filed an ancillary bill in that court, making the plaintiff and all other insurers of the property defendants, alleging that all the insurance contracts were, by their terms, interdependent, and setting up certain equities necessary to be adjudicated before the liability of any one of the insurers under its policy could be determined. *Held*, that neither the fact that actions on some of the policies were pending in the state court nor that such court refused to surrender jurisdiction of those sought to be removed deprived the federal court of jurisdiction to enjoin the further prosecution by the insured of any of the actions in either court until a hearing on the bill. Such an injunction does not deny the jurisdiction of the state court, nor affect to interfere with it, but operates only on the plaintiff in the actions to prevent him from making an unfair use of the processes of courts of law to deprive the complainants of rights which, under the facts alleged in the bill, such courts cannot adequately protect.—*Home Ins. Co. of New York v. Virginia-Carolina Chemical Co.*, 109 Fed. 681.

[n] (U. S. 1901) Where the highest court of a state, in an appropriate action, has decided that taxes were properly assessed, and are legal and valid under the constitution and laws of the state, a federal court will not entertain a suit to enjoin their collection.—*Douglas Co. v. Stone*, 110 Fed. 812.

[o] (U. S. 1902) Under Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the federal courts from enjoining proceedings in state courts, which is declaratory of a rule of comity, a federal court has no power to enjoin a sale of estate lands ordered by the Arkansas probate court to pay judgments against the estate; such court, under Const. Ark. art. 7, § 34, being a court of record having exclusive jurisdiction of the estates of deceased persons, the lands of which estates, under Sand. & H. Dig. Ark. § 80, are estate assets, subject to the payment of debts; and this is true even though the injunction suit is ancillary to a suit to set aside such judgments for fraud, commenced after the sale has been ordered.—*Evans v. Gorman*, 115 Fed. 399.

[p] (U. S. 1903) It seems that federal courts would not allow state courts to restrain the prosecution of suits relative to the infringements of patents, over which federal courts have exclusive jurisdiction; but no practical difficulty of that nature now arises.—*Green v. Porter*, 123 Fed. 351.

[q] (U. S. 1904) Where several insurers were only pro rata liable for loss, if liable at all, and several suits in the state courts had been brought against them, to which the same defenses were interposed, and some of the suits were

removed to the federal courts, but others could not be removed because of the insufficiency of the amount in controversy, prosecution of the suits at law both in the federal and state courts might be enjoined by a bill in the federal court to have the liabilities of the various insurers determined and adjusted by the federal court, as a court of equity, under such bill.—*Rochester German Ins. Co. v. Schmidt*, 126 Fed. 998.

[r] (Cal. 1900) That some of the defendants, in an action in a state court for the wrongful death of plaintiff's intestate on a sailing vessel, made application, as the owners of the vessel, to a federal court, for a limitation of their liability under the United States statutes relating to the merchant marine, and that the federal court enjoined plaintiff from further proceedings in the state court against these defendants, is not a bar to the plaintiff proceeding in such court against the other defendants, where he has received no satisfaction for the wrong complained of.—*Grundel v. Union Iron Works*, 39 Pac. 826, 127 Cal. 438, 47 L. R. A. 467.

II. PRIORITY OF JURISDICTION AND CONTROL OF PROPERTY IN CONTROVERSY.

[a] (U. S. 1900) Under the statute of Nevada (*Cutting's Comp. Laws*, par. 3122) which requires the filing of a notice of *lis pendens* with the county recorder in order to charge subsequent purchasers with constructive notice of the pendency of an action affecting the title or possession of real property, a purchaser of land without knowledge or actual notice of a suit then pending in a state court between his grantor and others involving water rights in connection with such land, and in which no notice of *lis pendens* was filed, is not affected by such suit, and the institution by him of a suit in a federal court to determine his water rights, and the service of process and an injunction therein upon the defendants, who are also the adverse parties in the action in the state court, vests the federal court with priority of jurisdiction over the subject-matter and the parties, and it may properly protect such jurisdiction by an injunction restraining the defendants from further prosecuting the suit in the state court, to which, subsequent to the service of process upon them, they have made the complainant a party.—*Pitt v. Rodgers*, 104 Fed. 387, 43 C. C. A. 600.

[b] (U. S. 1900) In a suit in equity in a federal court, brought, among other things, to recover possession of certain real estate, and to cancel a deed of trust executed by prior owners thereon for fraud, the grantors and grantees in such deed were made defendants. The grantees answered, under oath, that long before the commencement of the suit they had sold and transferred the deed of trust and the notes secured thereby to a bank named, and disclaimed any interest in the property. After replications had been filed, the testimony taken, and the cause set down for hearing, the bank which owned the deed of trust commenced a suit for its foreclosure in a state court, and, in accordance with the practice, procured the issuance of a writ of sequestration, under which the sheriff took possession of the property. *Held*, that the federal court had not acquired such priority of jurisdiction as authorized it, in view of Rev. St. § 720 [*U. S. Comp. St.* 1901, p. 581], which prohibits the granting of any injunction to stay proceedings in any court of a state, to enjoin the prosecution of the foreclosure suit in the state court, upon the filing of an amended bill by the complainant, in which for the first time the bank was made a party defendant.—*Oliver v. Parlin & Orendorff Co.*, 105 Fed. 272, 45 C. C. A. 200.

[c] (U. S. 1899) A suit was brought in a state court by owners of lands in severalty to establish water rights in connection with such lands, which they held or claimed through a ditch owned in common. No injunction was issued, and no action taken in the suit beyond the filing of the complaint and the answer of the defendants. Several years after, while the suit was so pending, certain of the plaintiffs sold and conveyed their lands and water rights. The grantee, who was a citizen of another state, subsequently brought suit in a federal court against the same defendants and others to establish his water rights. Process was served on the defendants, who appeared without objection, and, on application of complainant, a preliminary injunction was granted. *Held* that, on acquiring the property, the complainant had his election to con-

tinue the suit in the state court, either in the name of his grantors or by being substituted as a plaintiff, as permitted by the state statute, or, not having become a party to such suit, to commence a new one, and that having elected to do the latter, and the federal court, on the appearance of the defendants, being the only court then having full jurisdiction of all the parties and the subject-matter, it was entitled to retain such jurisdiction to dispose of the controversy, and to protect it by an injunction restraining the defendants from afterwards bringing the complainant into the state court and further proceeding therein.—*Rodgers v. Pitt*, 96 Fed. 668.

[d] (U. S. 1901) The power of a federal court to grant an injunction restraining the prosecution of an action in a state court on the ground that the federal court previously acquired, and still has, jurisdiction over the subject-matter of such action in a pending cause, is not affected by Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], providing that no injunction shall be granted to stay proceedings in a state court, which has no application where the injunction is sought to protect the court's own prior jurisdiction.—*Mercantile Trust & Deposit Co. v. Roanoke & S. Ry. Co.*, 109 Fed. 3.

[e] (U. S. 1901) A railroad company and a mining company entered into a contract by which the latter agreed to construct the roadbed for a spur track to its mines from the line of the railroad, and to convey title to the same to the railroad company, which was to iron and operate the spur, and repay to the mining company the cost of the roadbed from freights received. After the spur was constructed and in operation, suit was brought in a federal court to foreclose a mortgage on the road, which was sold therein to a new company. The mining company filed a petition of intervention in such suit, asserting its right to payment of the remainder due on its roadbed, which was resisted on the ground that it had not conveyed title to the railroad company as required by the contract. Suit having been brought in a state court to foreclose liens on the property of the mining company, in which a receiver was appointed, so that the company could not make title to the right of way of the spur track as required by the contract, and the mines being no longer operated, the new railroad company removed the track therefrom. The receiver of the mining company then brought an action of trespass in the state court to recover damages for such removal, the petition of intervention in the federal court being still pending and undetermined. *Held*, that the subject-matter of the action at law and the intervention was the same, namely, the rights of the mining company under the contract, and, in so far as the action in the state court sought recovery for property which passed to the railroad company by the sale, the parties were also the same, the decree under which the sale of the railroad property was made having required the purchaser to pay the amount of any claims which the court should thereafter determine to be prior in lien or superior in equity to the mortgage, and that the federal court, having first acquired jurisdiction, would protect such jurisdiction by injunction restraining the further prosecution of the action in the state court as to such property.—*Mercantile Trust & Deposit Co. v. Roanoke & S. Ry. Co.*, 109 Fed. 3.

[f] (U. S. 1901) A federal court in a suit by stockholders of a railroad company issued a preliminary injunction restraining such company from putting in force a schedule of rates prescribed by a state statute alleged to be in violation of the Constitution of the United States, and also enjoining officers of the state, who were made defendants, from instituting proceedings to enforce such statute. In related suits against the same state officers, involving the same questions, and by stipulation to be determined on the same evidence, appeals were taken to the Supreme Court of the United States, which held the statute unconstitutional, and also that the suits were within the jurisdiction of the court, and the injunctions granted therein were made permanent. An Attorney General of the state, who subsequently succeeded to the office, instituted suits in the name of the state in state courts against the railroad company defendant in the first-named suit, in which there had been no final hearing, to recover heavy penalties for its failure to put in force the schedule of rates prescribed by such statute. *Held*, that such suits were an interference with the prior acquired jurisdiction of the federal court, and, on proper application therefor, its injunction would be extended to the new Attorney General to restrain him from further prosecuting them until its own

determination of the pending suit.—*Starr v. Chicago, R. I. & P. Ry. Co.*, 110 Fed. 3.

[g] (U. S. 1901) Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted; and, when a federal court has so acquired priority of jurisdiction, it is its duty to protect such jurisdiction by injunction, if necessary, and that right is not affected by the eleventh constitutional amendment, withholding from its jurisdiction suits against states, nor by Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the issuance of injunctions to stay suits in a state court.—*Starr v. Chicago, R. I. & P. Ry. Co.*, 110 Fed. 3.

[h] (U. S. 1901) Where by suit in the United States Circuit Court a mortgage of a railroad has been foreclosed and the property sold under a decree requiring the purchaser to enter his appearance in such action, such purchaser may by supplemental bill enjoin a suit in a state court by a creditor of such railroad company to recover a pre-existing claim and enforce a lien on such property, and attacking the good faith of the foreclosure proceedings, notwithstanding Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting injunctions to stay proceedings in state courts, since such section extends only to cases in which the jurisdiction of the state court first attached, and not to cases over which the federal court had prior jurisdiction.—*State Trust Co. v. Kansas City, P. & G. R. Co.*, 110 Fed. 10.

[i] (U. S. 1901) A Circuit Court of the United States which has rendered a decree from which an appeal is pending has power, upon an ancillary bill filed for the purpose, to grant an injunction restraining one of the parties from prosecuting against the other an action subsequently commenced in a state court of another state involving a question or affecting rights determined by such decree until the appeal therefrom has been determined.—*Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 111 Fed. 431.

[j] (U. S. 1902) Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], does not prevent a federal court from granting an injunction to stay proceedings in a state court for the protection of its own previously acquired jurisdiction.—*Stewart v. Wisconsin Cent. Ry. Co.*, 117 Fed. 782.

[k] (U. S. 1904) In a suit in a federal court involving property which had been left by the will of the owner in trust for the benefit of the complainant, a decree was entered on a cross-bill ordering the sale of the property to satisfy a mortgage therein given by complainant to defendant, and directing that the surplus be paid to the trustees named in the will. Prior to the sale, complainant brought suits in a state court, praying for an accounting by such trustees and for their removal. *Held*, that such suits did not interfere with any property over which the federal court acquired jurisdiction which warranted the federal court in enjoining their prosecution.—*Copeland v. Bruning*, 127 Fed. 550, 63 C. C. A. 435.

III. PROCEEDINGS IN STATE COURT AFFECTING PROCEEDINGS IN BANKRUPTCY COURT.

[a] (U. S. 1902) A court of bankruptcy is without jurisdiction to enjoin further proceedings under the judgment of a state court in a judgment creditors' action commenced before the passage of the bankruptcy act, which set aside as fraudulent certain transfers of property made by the bankrupt, and directed the payment of the amount of the judgment out of the proceeds of a sale of the judgment debtor's property under an order of the state court.—*Metcalf v. Barker*, 23 Sup. Ct. 67, 187 U. S. 165, 47 L. Ed. 122.

[b] (U. S. 1902) The jurisdiction of a state court over a suit by a judgment creditor to set aside a deed as fraudulent is not lost by the action of the complainant in proving up her judgment as a preferred debt before the referee in bankruptcy proceedings; nor does such action amount to her consent to the exercise by a court of bankruptcy of jurisdiction to enjoin further proceedings in the state court. Decree, *Pickens v. Dent* (1901) 106 Fed. 653, 45 C. C. A. 522, affirmed.—*Pickens v. Roy*, 23 Sup. Ct. 78, 187 U. S. 177, 47 L. Ed. 128.

[c] (U. S. 1902) A suit to enjoin the further prosecution in a state court of a long pending suit by a judgment creditor to have a deed set aside as fraud-

ulent, and the property described therein sold and the proceeds applied to the payment of the judgment and the satisfaction of the liens existing against the property, is not within the jurisdiction of a court of bankruptcy, especially where instituted by the bankrupt himself. Decree, *Pickens v. Dent* (1901) 106 Fed. 653, 45 C. C. A. 522, affirmed.—*Pickens v. Roy*, 23 Sup. Ct. 78, 187 U. S. 177, 47 L. Ed. 128.

[d] (U. S. 1900) Where a creditor claiming a mechanic's lien on property of a person who has been adjudged bankrupt, over which the court of bankruptcy has acquired jurisdiction, brings an action in a state court for the foreclosure of such lien without leave of the bankruptcy court, it is an unwarrantable interference with assets of the bankrupt in the custody of the latter court, and the further prosecution of such action will be stayed.—*In re Emslie*, 102 Fed. 291, 42 C. C. A. 350.

[e] (U. S. 1900) After the institution of proceedings in bankruptcy, a mortgage creditor of the bankrupt brought suit in a state court to foreclose his mortgage, and procured the appointment of a receiver therein. The trustee in bankruptcy, challenging the validity of the mortgage lien, in part, obtained leave from the state court to sue its receiver for the recovery of the property, and began an action against him in the court of bankruptcy. The mortgagee moved the latter court to permit him to make the trustee a party to his foreclosure suit, and the trustee applied for an injunction to restrain the further prosecution of the foreclosure proceedings. *Held*, that the court of bankruptcy should retain its jurisdiction over the controversy until the claims of the parties were fully determined, and that, pending such adjudication, the application of the mortgagee should be denied, and that of the trustee granted.—*In re San Gabriel Sanatorium Co.*, 102 Fed. 310, 42 C. C. A. 369; *Perkins v. Markham*, Id.

[f] (U. S. 1900) Where, four months prior to being adjudicated a bankrupt, a debtor sold certain buildings, under an agreement with the vendee that if any liens were established against the property the latter might discharge the same out of part of the purchase price retained by him, and thereafter mechanics' liens were filed against the buildings, and suits brought to enforce the same in a state court, after proceedings in bankruptcy had been instituted against the vendor, the trustee of the bankrupt is not entitled to have the suits for the enforcement of the liens against the buildings enjoined, and the proceedings removed to the bankrupt court.—*In re Horton*, 102 Fed. 986, 43 C. C. A. 87.

[g] (U. S. 1901) Where an action was begun in a state court and prosecuted to judgment, execution issued, and the property subjected to pledge by the judgment seized and advertised for sale before the institution of voluntary proceedings in bankruptcy, the state court having possession of the property and jurisdiction of the parties, the court of bankruptcy had no authority to stop the proceedings.—*In re Seebold*, 105 Fed. 910, 45 C. C. A. 117; *Wilcox v. Civil Sheriff of Parish of Orleans*, Id.

[h] (U. S. 1901) A judgment creditor instituted a suit in a state court of competent jurisdiction to set aside a conveyance of property by the debtor. Pending such suit, and several years after its commencement, the debtor was adjudged a bankrupt, and thereafter the state court entered a decree setting aside the conveyance and ordering a sale of the property to satisfy the liens established against it. *Held*, that the proceedings in bankruptcy did not divest such court of the jurisdiction it had acquired over the bankrupt and the property, nor warrant a federal court in interfering with the execution of its decree.—*Pickens v. Dent*, 106 Fed. 653, 45 C. C. A. 522.

[i] (U. S. 1898) After a voluntary assignment for the benefit of creditors, a vendor of goods alleged to have been purchased by fraudulent representations assigned his claim, and the assignee thereof brought replevin against the voluntary assignee under which a promiscuous seizure was made by the sheriff of goods in possession of the voluntary assignee, including goods not described in the writ as well as goods manufactured and in process of manufacture. The next day involuntary proceedings in bankruptcy were commenced by creditors. On motion to restrain the sheriff from delivery of the goods seized, *held*, that the abuse of the replevin process, other circumstances in the case, and the proper defense of the rights of creditors in bankruptcy require that the deliv-

ery of the property by the sheriff should be restrained.—*In re Gutwillig*, 96 Fed. 481.

[j] (U. S. 1900) A court of bankruptcy has jurisdiction over a judgment creditor of the bankrupt, for the purpose of enjoining him from proceeding in a state court for the enforcement of his judgment against property of the debtor, where the judgment was rendered null or inoperative by the adjudication of the debtor as a bankrupt within four months after its rendition, because all creditors are parties to the proceedings in bankruptcy, and because the court has power to restrain any person from illegally possessing himself of assets of the estate.—*In re Lesser*, 100 Fed. 433.

[k] (U. S. 1900) Where an action for the foreclosure of a mortgage has been brought in a state court of competent jurisdiction, and that court has rendered a decree fixing the liability of the mortgagor and ordering a sale of the property affected, before the filing of the petition in bankruptcy, such court has control of the property for the purposes of sale, and has jurisdiction, exclusive of the court of bankruptcy, to determine and enforce the rights of the mortgagee in and against the property; and the court of bankruptcy will not, at the instance of the trustee in bankruptcy, enjoin or stay the further prosecution of the proceedings in the state court.—*In re Gerdes*, 102 Fed. 318.

IV. ENFORCEMENT OF LAWS AND ORDINANCES ALLEGED TO BE INVALID.

[a] (U. S. 1899) Where a federal court, by a suit brought by a railroad company to enjoin the enforcement of a city ordinance on the ground of its unconstitutionality as impairing the obligation of a contract, has acquired lawful jurisdiction of the subject-matter, it is its duty to protect such jurisdiction by enjoining the prosecution by the city of an action commenced some time afterwards in a state court for the enforcement of the ordinance.—*Iron Mountain R. Co. of Memphis v. City of Memphis*, 96 Fed. 113.

[b] (U. S. 1900) An action having been brought for the recovery of a back assessment, and the taxpayer having appeared therein, he commenced an action in a federal court to enjoin the treasurer from proceeding in said action in the state court, on the ground that the statutes under which he acted were in conflict with the fourteenth amendment to the United States Constitution, providing that "no state shall deprive any person of life, liberty, or property without due process of law." *Held*, that the bill must be dismissed, since the exercise of such power is expressly forbidden by Rev. St. U. S. § 729 [U. S. Comp. St. 1901, p. 585], providing that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.—*Aultman & Taylor Co. v. Brumfield*, 102 Fed. 7.

V. CRIMINAL PROSECUTIONS.

[a] (U. S. 1898) A federal court has no jurisdiction to grant an injunction to restrain a prosecuting attorney of a state from prosecuting an indictment regularly found under a state statute conceded to be valid. In such case the injunction is virtually against the state itself.—*Harkrader v. Wadley*, 19 Sup. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

[b] (U. S. 1899) A federal court of equity has no power to enjoin the institution or prosecution of indictments or other criminal proceedings in a state court.—*Fitts v. McGhee*, 19 Sup. Ct. 269, 172 U. S. 516, 43 L. Ed. 535.

VI. ACTIONS BY OR AGAINST STATE OR UNITED STATES.

[a] (Neb. 1901) An injunction issued by the Circuit Court of the United States cannot lawfully forbid the Attorney General from suing for penalties claimed by the state under Maximum Freight Law, § 9 (Comp. St. 1899, c. 72, art. 12), since such court has no power to enjoin the state directly or indirectly from suing in its corporate capacity to recover such penalties.—*State v. Chicago, R. I. & P. R. Co.*, 85 N. W. 556, 61 Neb. 545.

[b] (Neb. 1901) It is no valid ground for the dismissal of an action brought by the state against a corporation that the federal court has granted an injunction to restrain the Attorney General from the prosecution thereof, since the federal court cannot enjoin a state from enforcing its own laws.—*State v. Chicago, R. I. & P. R. Co.*, 87 N. W. 188, 62 Neb. 123.

VII. ANNULMENT OF JUDGMENT OR PROCEEDING IN DEFIANCE OF JUDGMENT OF FEDERAL COURT.

[a] (U. S. 1899) A Circuit Court of the United States is not prevented by Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], from granting an injunction against a proceeding in a state court, where necessary to render effective its own decree; and where it has rendered a decree foreclosing a mortgage upon a railroad, and has sold the property thereunder, it has jurisdiction, as ancillary to such suit, to entertain a bill by the purchaser to enjoin a stockholder of the mortgagor company from maintaining a suit in a state court against such company to place the road in the hands of a receiver, in disregard of the decree of the federal court, by which he is bound, and of the rights of the purchaser thereunder. Decree, *Central Trust Co. of New York v. Western N. C. R. Co.* (C. C. 1898) 89 Fed. 24, modified.—*James v. Central Trust Co. of New York*, 98 Fed. 489, 39 C. C. A. 126.

[b] (U. S. 1898) A federal court which has obtained jurisdiction may enjoin a party from prosecuting in a state court an action that will annul its judgment, notwithstanding Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting enjoining proceedings of state courts.—*Central Trust Co. v. Western N. C. R. Co.*, 89 Fed. 24.

[c] (U. S. 1901) A Circuit Court of the United States is not prevented, by Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], from granting an injunction to stay a proceeding in a state court, where necessary to protect its own prior jurisdiction, or to render effective its own decree; and where it has rendered a decree foreclosing a mortgage on a railroad, and has sold the property thereunder, and conveyed the same to the purchaser, expressly providing in its decree of confirmation that the purchaser shall take the property and franchises as the absolute owner thereof, and free from the claims of any one claiming by, under, or through the mortgagor, it has jurisdiction, as ancillary to such suit, to entertain a supplemental bill filed by the complainant and the purchaser therein for an injunction to restrain the threatened sale of the property under an execution issued from a state court upon a judgment rendered against the mortgagor company, on a cause of action which arose after the sale and after the purchaser had been placed in possession of the property. Under such circumstances, the attempt to subject the property to the judgment against the mortgagor is in direct defiance and contravention of the decree of the federal court, and it is the duty of that court to protect its purchaser and its jurisdiction by maintaining the effectiveness of its decree.—*Central Trust Co. v. Western North Carolina R. Co.*, 112 Fed. 471.

VIII. ENFORCEMENT OF JUDGMENT OR EXECUTION.

[a] (U. S. 1899) Comity prevents a federal court from enjoining enforcement of an execution of a state court.—*Leathe v. Thomas*, 97 Fed. 136, 38 C. C. A. 75.

[b] (U. S. 1899) An order enjoining a sheriff from proceeding with the collection of an execution lawfully issued to him in pursuance of a decree is within the prohibition of Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], against an injunction by a court of the United States to stay any proceeding in a state court.—*Leathe v. Thomas*, 97 Fed. 136, 38 C. C. A. 75.

[c] (U. S. 1900) Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], declaring that writ of injunction shall not be granted by a federal court to stay proceedings in any court of a state, applies where levy and sale under execution on a judgment of a state court is sought to be enjoined, though the writ is asked by one not a party to the action in the state court in which the judgment was obtained, who claims that he is sole owner of the land sought to be sold.—*Mills v. Provident Life & Trust Co. of Philadelphia*, 100 Fed. 344, 40 C. C. A. 394.

[d] (U. S. 1900) Levy and sale under an execution is a "proceeding" within Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], declaring that writ of injunction shall not be granted by a federal court to stay "proceedings in any court of a state."—*Mills v. Provident Life & Trust Co. of Philadelphia*, 100 Fed. 344, 40 C. C. A. 394.

[e] (U. S. 1899) Proceedings under an execution against property, issued to enforce a money judgment rendered in a state court, are proceedings in such

court, within the meaning of Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], and cannot be restrained by an injunction issued by a federal court; but, if the sheriff levies upon property not owned by the judgment defendant, his acts are contrary to the command of the writ, and are not proceedings in the court, within such section.—*Provident Life & Trust Co. of Philadelphia v. Mills*, 91 Fed. 435.

[f] (U. S. 1899) Where real estate of a complainant, of which he is in possession, has been levied on under a judgment of a state court against another person, to which he was not a party, and, under the laws of the state, complainant would be entitled to bring a suit against the purchaser at a sale under such levy, for the cancellation of his deed, of which suit a federal court would have jurisdiction, such court may properly entertain a preventive suit to enjoin the sale.—*Provident Life & Trust Co. of Philadelphia v. Mills*, 91 Fed. 435.

[g] (U. S. 1902) Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], which prohibits a federal court from granting an injunction to stay proceedings in a state court, has no application to the granting of an injunction to restrain a sheriff from selling, under an execution from a state court, property of a third person who was not a party to the judgment, in which he is not acting under the process of the state court, but in abuse of it, and as a trespasser.—*Julian v. Central Trust Co.*, 115 Fed. 956, 53 C. C. A. 438.

(128 Fed. 736.)

SHADBOLT v. McKEE.

(Circuit Court of Appeals, Second Circuit, March 2, 1904.)

No. 120.

1. PATENTS—INFRINGEMENT—COAL TRUCKS.

The Shadbolt patent, No. 532,216, for an improvement in coal trucks or heavy wagons, consisting in making the box deeper at the back end, with the bottom sloping toward the back, to facilitate unloading, but wider in front, to equalize the weight of the load over the two axles, is not infringed by a wagon in which the top of the box is a parallelogram, but the sides converge toward the bottom uniformly, so that the deeper portion at the back is narrower at the bottom than the front.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Appeal by defendant from a decree of the Circuit Court for the Eastern District of New York, sustaining letters patent No. 532,216, granted January 8, 1895, to the complainant for improvements in coal trucks or heavy wagons, and granting an injunction and an accounting.

Clifford E. Dunn and Jas. T. O'Neill, for appellant.

Edmond C. Brown, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The patent, though relating to wagons of all kinds, is designed more especially to cover heavy trucks, the structure being described and shown as embodied in a coal truck.

The specification states that coal trucks had been constructed, therefore, with a body deepest at the rear end, the bottom sloping from front to rear for convenience in dumping the load and the top being substantially horizontal. This construction placed the weight very unevenly on the two axles of the truck. The object of the invention, so far as it is involved in the present controversy, is "to preserve the sloping bottom and depth at the rear of the body, and yet equalize the load more or less exactly on the two axles." This object is accom-

plished by making the body wider at the front end than at the rear end, the increase in width compensating for the decrease in depth.

The claims are as follows:

"(1) A wagon having a fixed or nontilting body which is wider at its front end than at its rear end, and tapered substantially as set forth and which is deeper at its rear than at its front end.

"(2) A wagon having a body which is deeper at its rear end than at its front end and wider at its front end than at its rear end, the bottom of the body being inclined toward the rear or tail end, substantially as described."

The only defense argued and the only one necessary to consider is that of noninfringement.

The defendant's truck differs from the old type, referred to in the patent, only in having sides which, to a slight degree, slope inwardly toward the bottom. A line drawn around the top of the body forms a perfect rectangle, but the floor is eight inches wider at the front than in the rear. In other words, the sloping sides are nearer together at the deepest part than at the shallowest part, but equidistant, front and rear, if measured on the same plane.

The defendant has not, to any appreciable extent, widened the front end of his truck. He has, because of the converging sides, decreased its width and, therefore, lessened its carrying capacity. This is equally true of the rear end. The carrying capacity is correspondingly decreased and the only tendency to equalize the load on the two axles must be attributed to the sloping sides which, to some extent, must, of course, lessen the load at the bottom of the rear end of the truck.

But even if it be admitted that the defendant's truck to some extent equalizes the load it does so by decreasing the carrying capacity of the truck instead of increasing it and by a construction distinctly different from that described in the patent.

There can be no doubt that the feature of invention which distinguishes it from the prior art is the widening of the front end of the wagon. This feature is emphasized again and again in the drawings, description and claims. Instead of being rectangular at the top the wagon of the patent is cuneiform. It is even recommended that the front end may be so broadened as to extend beyond the wheels.

The specification says:

"As the fore wheels can swing in under the body, it would be feasible so to widen the body at the front end as to make it extend out laterally over and above said wheels."

Again, in his testimony, the patentee says:

"The width of the Shadbolt truck being much greater on the front than on the rear, the top of the box is wider at the front end than it is at the back end.
* * * The increased width at the front end of the truck gives a greater storage capacity at the front end."

Assuming that the defendant accomplishes a similar result in equalizing the weight, and this is by no means clear from the record, it cannot be held that he uses the means described and claimed. Instead of making his wagon body wider at the front end than at the rear, whether measured at top or bottom, he uses a body with sides beveled or flared outwardly toward the top, thus decreasing, in a slight degree, the carrying capacity of the pocket at the rear end.

It appears from the testimony that wagons with sides beveled instead of vertical have existed from time immemorial. The sides of the complainant's truck body flare longitudinally towards the front, thus making a much wider space and corresponding storage room there than at the rear end. The sides of the defendant's body diverge from a vertical line, uniformly, the entire distance. It is clear, therefore, that if his truck were constructed with a flat instead of an inclined floor, the increase in carrying capacity would be equal throughout its entire length. The increase at the front would be exactly balanced by a corresponding increase at the rear. Whether the load area is made larger or smaller depends, of course, upon whether or not the flare is made by increasing or decreasing the distance between the tops of the parallel sides.

Given a wagon body with straight parallel sides; if the distance between the sides at the top remains unchanged and the flare is produced by converging the sides towards the bottom, it is obvious that the load space will be decreased; on the other hand, if the sides flare out from the bottom this space will be increased.

In order to hold that the defendant infringes we must find that his wagon is wider at the front than at the rear. Even if the complainant were entitled to equivalents we are of the opinion that the slight decrease in load space, produced by the narrowing of the sides as the depth increases towards the rear of the defendant's truck, cannot be considered as an equivalent for the wide front end which is clearly emphasized as the distinguishing feature of the patented structure.

The complainant has failed to establish infringement.

The decree of the Circuit Court is reversed with costs.

(128 Fed. 738.)

GENERAL ELECTRIC CO. v. NEW ENGLAND ELECTRIC MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 93.

1. EQUITY PLEADING—EFFECT OF SETTING DOWN PLEAS FOR ARGUMENT.

By setting down pleas for argument, a complainant admits the facts, but not the conclusions, pleaded therein.

2. PATENTS—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

Pleas to a bill in equity for infringement of a patent which in effect admit infringement up to a date a short time prior to the filing of the bill, but allege that on that date defendant ceased manufacturing the infringing article, except to make up material on hand, and that prior to the filing of the bill it wholly abandoned such manufacture and sale, and has since neither made, used, nor sold the invention of the patent, but has made deliveries on contracts of sale previously made only, do not state facts constituting a bar to the suit, since, admitting such facts, the court may in its discretion grant an injunction to restrain a resumption of the infringement or the continued sale of the infringing articles, and require an accounting.

¶ 1. See Equity, vol. 19, Cent. Dig. § 409.

¶ 2. Pleading in patent infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 123 Fed. 310.

Appeal from a decree of the Circuit Court for the Southern District of New York sustaining defendants' pleas and dismissing the bill of the General Electric Company, the complainant.

Samuel Owen Edmonds, for appellants.

Edward P. Payson and Clifton V. Edwards, for the appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The bill is in the usual form, alleging the infringement of letters patent No. 516,844, granted to Alfred Swan, March 20, 1894. The bill was verified October 10, 1902, and was filed December 13, 1902.

The defendants filed pleas which were once amended by leave of the court. As amended the pleas, though not in identical language, allege, in substance, that the defendants made and sold the infringing devices until "August, 1902, at which time, because of the disapproval by underwriters and slight profits, said defendant company abandoned the manufacture thereof and thereafter made up only its remaining receptacle stock, and since October 10, 1902, it has not itself or by any agent made any sale of such 'receptacle,' but only completed delivery of 'receptacles' sold as aforesaid, and that long before the bringing of this bill for injunction defendant company had wholly and in good faith ceased to make, use or sell itself or by other said 'receptacles 9,171' and the invention of said Swan patent; and is not threatening and does not intend, now or at any time in the future, to manufacture or sell said receptacles, but has in good faith finally abandoned such manufacture and sale."

By setting the pleas down for argument the complainant has admitted the facts but not the conclusions pleaded therein. *Farley v. Kittson*, 120 U. S. 303, 314, 7 Sup. Ct. 534, 30 L. Ed. 684; *Burrell v. Hackley* (C. C.) 35 Fed. 833, and cases cited.

We have, then, the following facts: First. Subsequent to the granting of the Swan patent and until August, 1902, the defendants were engaged in manufacturing and selling devices which infringed the patent. Second. From August, 1902, until October 10, 1902, they ceased manufacturing new receptacles and only made up the stock then on hand. Third. Since October 10, 1902, they have not made any new sales of infringing receptacles but have completed the delivery of receptacles sold prior thereto. Fourth. Prior to the filing of the bill they had wholly ceased to make, use or sell the patented device.

If the pleas be analyzed a little closer it will be observed that defendants, in effect, admit infringement prior to August, 1902. In August of that year they stopped making new receptacles, but admit that from August until October 10th they were engaged in making up the stock on hand. They do not deny that they were selling receptacles during this period. After October 10th, the date of the verification of the bill and two months before it was filed, they ceased to sell but continued to deliver infringing receptacles; and for aught that appears have con-

tinued to deliver and are now delivering said receptacles. The pleas draw a sharp distinction between new sales of the infringing devices and their delivery pursuant to old sales, so that the allegation that defendants ceased, prior to the suit, to make, use or sell the patented device is not at all incompatible with the theory that they have a large stock of infringing devices on hand which they can at any time put on the market. In other words, the defendants seem to be of the opinion that it is not an infringement of the patent to distribute infringing receptacles to their customers provided the contract of sale was made prior to August, 1902.

The pleas do not state a complete bar to the suit. Conceding all their averments to be true the court may retain the case in order to do exact equity between the parties. If the case were at final hearing upon the precise facts now developed the court might, it is true, feel warranted in suspending the injunction, but it would not be compelled to do so. The probability is that it would follow the practice, so frequently adopted, where the defendant admits past infringement and is shown to be in a position where he can at any time resume, namely, issue the injunction. The argument in such circumstances is very simple. If the defendant be honest in his protestations an injunction will do him no harm; if he be dishonest the court should place a strong hand upon him in limine. *Chemical Works v. Vice*, 14 Blatchf. 179, Fed. Cas. No. 12,136; *Wollensak v. Reiher* (C. C.) 28 Fed. 427; *Celuloid Co. v. Arlington* (C. C.) 34 Fed. 324; *Sawyer Spindle Co. v. Turner* (C. C.) 55 Fed. 979; *Electric Works v. Henzel* (C. C.) 48 Fed. 375.

The case of *Odell v. Stout* (C. C.) 22 Fed. 169, does not, in our judgment, sustain the defendants' position. Imprimis, the case was heard at final hearing on pleadings and proofs and not on plea. It appeared that the defendant, prior to the suit, discontinued the manufacture of one type of infringing mill and commenced, and, at the time of the suit, was engaged in the manufacture of another type of infringing mill. The court said of the former mill: "If the complaint were only on account of the manufacture and sale of that mill, the case would not be one for an injunction." The opinion concludes with the following statement: "However, as we find that the defendants in this case are infringers, we think it well to retain the whole case under our control, and the injunction and order for an account may be made to apply to the manufacture and sale of both mills." The remark relied on by the defendants here was made after the court, having heard the entire controversy, was "satisfied that the abandonment was in good faith and final."

In the case at bar no such condition exists. Every averment of fact pleaded may be true and still the defendants may have at all times been delivering infringing receptacles pursuant to contracts previously sold. They may at the present time be manufacturing certain parts of the receptacles to be assembled afterwards by the purchaser, thus making them contributory infringers. They may have a large stock of infringing receptacles on hand and they may, when market conditions improve, change their present purpose and resume the manufacture and sale of the infringing devices. In short, as before stated, the pleas do

not allege facts which are a bar to the action. Admitting all the averments to be true the court at final hearing may conclude to grant an injunction and an accounting.

The decree dismissing the bill is reversed with costs and the cause is remanded to the Circuit Court with instructions to proceed therein as the equity rules require.

(128 Fed. 899.)

CHILBERG v. LYG.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1904.)

No. 976.

1. BROKERS—SALE OF MINES—SUBAGENTS—EMPLOYMENT—CUSTOMS—KNOWLEDGE.

A general custom in a certain city for brokers intrusted with the sale of mining properties to employ subagents to assist in securing purchasers, and to allow them commissions out of the purchase price for their services, is not binding on the owner of mining claims left with a broker for sale, in the absence of proof of the owner's knowledge thereof.

2. SAME—CONTRADICTING WRITTEN CONTRACT.

Where a broker engaged to sell certain mines agreed to effect the sale for a commission of 5 per cent., evidence of a custom of brokers to employ subagents to assist in the sale, and to allow them a commission out of the purchase price for a sale affected, was inadmissible, as tending to vary the unambiguous agreement of the parties.

3. SAME—VALIDITY OF CUSTOM—PUBLIC POLICY—FRAUD.

A custom of brokers in a certain city to employ subagents to assist in securing purchasers for mining claims, and to allow them commissions out of the purchase price for their services, ordinarily secured by raising the price of the property, was contrary to public policy, as directly leading to fraud and questionable practices.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

W. V. Rinehart, Jr., and Ballinger, Ronald & Battle (J. J. Kennedy, of counsel), for plaintiff in error.

Page, McCutchen & Knight, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action at law brought by the defendant in error in the court below to recover of the plaintiff in error certain moneys received by him as the agent of the plaintiff below and of his assignor, one Dexter, on the sale of certain mining claims situated in Alaska, and belonging to Lyng and Dexter, respectively. The case shows that Lyng, acting for himself and Dexter, employed the plaintiff in error, Chilberg, who resided at Seattle, Wash., to sell these claims, agreeing to take \$2,000 cash on each claim, and a balance of \$23,000 for Lyng's claim, and \$28,000 for Dexter's claim by September 15, 1900; "the claims to be worked by the buyers the whole season or

¶ 1. See Customs and Usages, vol. 15, Cent. Dig. §§ 23, 24.

until Sept. 15th, the owners to get one-half or will take one-third of all gold taken out up to that time"; Chilberg to receive for his services in that behalf a commission of 5 per centum. The latter effected a sale of the two claims to a Mr. Strout, acting for a Mr. Fleitmann, of New York, and was so prompt in remitting (in part) that he telegraphed Lyng from Seattle to San Francisco \$3,770.70, which was \$2,000 on each claim, less his commission of 5 per centum, amounting to \$200, attorney's fee for drawing papers, \$15, and cost of telegrams, \$14.30. This was followed by a letter from the plaintiff in error reading as follows:

"Seattle, Wash., May 14, 1900.

"Mr. R. T. Lyng, Room 14, Mills Building, San Francisco, Cal.—Dear Sir: I have to-day wired you through the Crocker-Woolworth National Bank \$3,770.70 covering amount accruing to you from sale of Nos. 4 and 5 Below on Anvil Creek as consummated by me. You will note that the total cash consideration reads \$7,500.00, \$3,500 of this was a confidential commission to parties who brought the trade about, and it is important that nothing be said about it so it can reach Mr. Strout in Alaska or Mr. Fleitmann in New York.

"If it should become public, it would probably spoil the balance of the trade. As this sort of a scheme was one on which I succeeded in raising the price to come out of the ground \$7,000.00 on each claim so I think you should be very well pleased with the whole trade.

"Mr. Fleitmann of New York for whom Mr. Strout is acting is several times over a millionaire, and able and willing to work the claims out if they show prospects, if it requires \$100,000.00 to do it, and from what I can learn these will be costly mines to work. It has been hard work to keep the sale open until the last papers arrived, and the 'Knockers' almost spoiled it twice.

"I hope you will be satisfied with the trade, and will expect the balance of my commission as the money is paid over to you.

"You will note that the quitclaim deeds are placed in escrow with the Alaska Banking and Safe Deposit Co., of Nome, who are the correspondents of our bank here, which I trust will be satisfactory to you. You will note also that I have provided that you receive one-half of all the gold taken out instead of one-third if they do not complete the purchase. I have used every endeavor to promote your interest in this matter, and feel highly gratified that it is consummated. I trust that you will observe the caution I have requested as to the \$3,500.00 as it would seriously harm friends of mine, and be detrimental to your chance of completing the deal.

"Enclosed find agreements, also location notice of your No. 4 which I return to you as requested. I also enclose the first power of attorney, which you sent me, and which was not used.

"With kindest regards, I remain, Very truly yours,

"Eugene Chilberg."

The purchaser of the claims subsequently, and prior to Dexter's assignment of his interests to Lyng, paid to Dexter \$8,750 of the deferred payment, 5 per centum of which the latter paid over to the plaintiff in error, Chilberg, and also paid to Lyng a like sum of \$8,750 on the deferred payment due on the claim sold by him, the defendant's commission on which Lyng had not paid at the time of bringing this action. Dexter having thereafter assigned to Lyng all of his rights in the premises, the latter brought the present action to recover of the agent, Chilberg, that portion of the cash payment made by the purchaser on the two claims which the defendant, Chilberg, failed to pay over to the owners of the claims, with interest and costs.

In his answer to the complaint the defendant, Chilberg, denied that

he received as cash payment on the sale of either of the claims in question any other or greater sum than \$2,000, and also set up in defense—

"That it was then, is now, and at all times herein mentioned has been, a general custom, usage, and practice in the city of Seattle for agents intrusted with the sale of mining properties to employ subagents and brokers to assist in securing purchasers for such properties, and to allow them commissions out of the purchase price for their services. That defendant followed said general custom, usage, and practice, and employed a broker to assist in securing a purchaser for said claims, and agreed with said broker that he should have, of the first cash payment which he might secure from any purchaser, all thereof over and above the amount fixed by the plaintiff as such cash payment, all of which was by the defendant promptly reported to the plaintiff, and he made no objection thereto."

On the trial it was clearly proved, and not disputed, that the defendant did in fact receive from the purchaser \$3,750 in cash on each claim, for only \$2,000 of which did he account to the owner of the property. The defendant claimed, and so the testimony showed, that he employed his cousin, one J. E. Chilberg, to assist him in effecting a sale of the property, to whom he turned over \$3,500 of the cash paid by the purchaser. There was no evidence tending to show that either the plaintiff or his assignor, Dexter, knew of any such arrangement between the defendant, Chilberg, and his cousin, or ever authorized any such arrangement, or ever varied the agreement by which the defendant, Chilberg, was employed as the agent of Lyng and Dexter to sell the claims for an agreed commission of 5 per centum on the amount of sale. Not only did the evidence fail to show any knowledge on the part of the plaintiff or of Dexter of any such custom as was alleged by the defendant, but at one stage of the trial, when the defendant was endeavoring to prove that the alleged custom prevailed in Seattle, the court pronounced to one of the attorneys for the defendant this inquiry, which was answered as follows:

"The Court: I would inquire just at this stage, Mr. Rinehart, do you intend to show knowledge or impute knowledge to Mr. Lyng—express knowledge, knowledge of this usage, if there be such usage? Mr. Rinehart: To be fair with the court, I cannot promise to prove express knowledge—Mr. Lyng having testified that he did not know of such a usage—but I think I can show facts which will charge him with knowledge, and would justify the jury in believing that he did have knowledge, and that he dealt with that knowledge in view."

Nothing was given in evidence tending to show any such knowledge on the part of the plaintiff or Dexter. The court below rightly excluded proof of any such custom on that ground. But no such custom, if it existed, could avail the defendant, for the reason, first, that it would be inadmissible to thus vary the unambiguous agreement of the parties (*Thompson v. Riggs*, 5 Wall. 663, 18 L. Ed. 704; *Schooner Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657; *Keller v. Meyer*, 74 Mo. App. 318; *Davis v. New York S. S. Co.* [Sup.] 54 N. Y. Supp. 78; *Jefferson v. Burhans*, 85 Fed. 949, 29 C. C. A. 481); and, secondly, such custom, if it existed, would be against public policy, as directly tending to lead to fraud and questionable practices. No better illustration of this fact is needed than that afforded by the letter of the

defendant written to the plaintiff after the completion of the transaction in question, where he said:

"You will note that the total cash consideration reads \$7,500. \$3,500 of this was a confidential commission to parties who brought the trade about, and it is important that nothing be said about it so it can reach Mr. Strout in Alaska or Mr. Fleitmann in New York. If it should become public, it would probably spoil the balance of the trade. As this sort of a scheme was one on which I succeeded in raising the price to come out of the ground \$7,000 on each claim, so I think you should be very well pleased with the whole trade. Mr. Fleitmann of New York, for whom Mr. Strout is acting, is several times over a millionaire, and able and willing to work the claims out if they show prospects, if it requires \$100,000 to do it, and from what I can learn, these will be costly mines to work. It has been hard work to keep the sale open until the last papers arrived, and the 'Knockers' almost spoiled it twice. * * * I trust that you will observe the caution I have requested as to the \$3,500, as it would seriously harm friends of mine, and be detrimental to your chance of completing the deal. * * *"

See *De Bussche v. Alt*, 8 L. R. Ch. Div. 286; *Geyser-Marion G. M. Co. v. Stark*, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684; *Day v. Holmes*, 103 Mass. 306; *Dodd v. Farlow*, 11 Allen, 426, 87 Am. Dec. 726; *Hopper v. Sage* (N. Y.) 20 N. E. 350, 8 Am. St. Rep. 771; *Smith v. Clews* (N. Y.) 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. Rep. 627.

The court below properly instructed the jury to render a verdict for the plaintiff, less 5 per centum commission on the \$8,750 which was subsequently paid to him by the purchaser, to which the defendant was entitled under the contract between the parties.

The judgment is affirmed.

(128 Fed. 902.)

McMANUS et al. v. CHOLLAR.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1904.)

No. 1,269.

1. FEDERAL COURTS—JURISDICTION—EQUITABLE DEFENSES—STATE PRACTICE.

Since the federal courts sitting in Texas observe the distinction between legal and equitable rights, an equitable defense cannot be maintained in an action of trespass to try title brought on the law side of a federal court sitting in that state, though under the state statutes equitable defenses are available in such action in the state courts.

2. SAME—DEEDS—CONSTRUCTION—PAROL EVIDENCE.

Where, in trespass to try title, there was no ambiguity in any of the conveyances, except that the common grantor had made absolute deeds to different parties covering the same tract of land, and the words of description were plain and unequivocal, letters written by such grantor to the grantee under the later deed, preliminary to the conveyance to him, were inadmissible to vary or explain the same.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

J. F. Lanier, for plaintiffs in error.

F. D. Minor and Geo. C. Greer, for defendant in error.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

SPEER, District Judge. This is a writ of error from the Circuit Court of the Eastern District of Texas. The case with relation to which the plaintiffs in error esteem themselves aggrieved is an action of trespass to try title to land. It was brought by Mary R. Chollar against William P. T. McManus and others. Verdict was directed against the plaintiffs in error, and from this and from certain rulings of the court the writ of error was granted.

The land sued for lies in the county of Hardin, state of Texas, and contains 420 acres. This is described in the plaintiff's petition as "all of that certain 640-acre survey originally granted to James B. Reaves, and described in patent No. 109, volume 12, dated February 12, 1860, from the state of Texas to R. O. W. McManus, save and except that certain two hundred and twenty acres off the south portion of part of said survey, * * * described in the deed from R. O. W. McManus to Caroline A. Parry, dated April 3, 1860." The tract of land sued for is otherwise described as the same embraced in a certain deed from R. O. W. McManus to James W. Danielson, dated August 17, 1877. There was also a claim for damages in behalf of the plaintiff in the court below, the defendant in error here, which were alleged to have been caused by the detention of said land. The damages laid are in the sum of \$5,500, and there is an alleged continuing damage of \$100 per month.

The plaintiffs in error answered said petition in the Circuit Court by a general demurrer, by general denial, and plea of not guilty, and by alleging that the cause of action, if any, is barred by the statute of limitations.

The statutory remedy by action of trespass to try title is defined by the following provisions of the Revised Statutes of Texas:

"Art. 5248. All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to lands, tenements, or other real property shall be by action of trespass to try title."

"Art. 5256. The defendant in such action may file only the plea of 'not guilty' of the injuries complained of in the petition filed by the plaintiff against him.

"Art. 5257. Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action, except the defense of limitation, which shall be especially plead."

Under these and some other statutes, the prevailing jurisprudence in the state courts of Texas is that an action of trespass to try title can be maintained or defeated on equitable titles (see *Hart v. Turner*, 2 Tex. 374; *Johnson v. Byler*, 38 Tex. 606; *Mayer v. Ramsey*, 46 Tex. 376; *Fuller v. Coddington*, 74 Tex. 334, 12 S. W. 47); but in the courts of the United States, although sitting in the state of Texas, the distinction between equitable and legal rights, based on constitutional provisions, has always been maintained (*Sheirburn v. De Cordova et al.*, 24 How. 423, 16 L. Ed. 741; *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198; *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327; *Carter v. Ruddy*, 166 U. S. 493, 496, 17 Sup. Ct. 640, 41 L. Ed. 1090). Therefore, whenever an action of trespass to try title is brought on the law side of the United States courts, an equitable defense thereto

cannot be maintained, and it follows that the rights of the parties before the court must be determined upon legal as distinguished from equitable principles.

A brief statement of the evidence will indicate how important is the effect of this rule in this case:

The plaintiff in the court below offered a patent dated February 10, 1860, from the state of Texas, granting to R. O. W. McManus, as assignee of James B. Reaves, 640 acres of land in the form of a square; also a deed from R. O. W. McManus to Caroline A. Parry, dated April 3, 1860, conveying 220 acres of the south end of the survey which accompanied the patent of James B. Reaves, and which may be termed the Reaves survey; also a deed dated August 17, 1877, from R. O. W. McManus to James W. Danielson, conveying 420 acres, the same being the south part of said Reaves survey. It will be presently seen that it is under this deed that the plaintiff in the Circuit Court claims title to the land in controversy. She also introduced a copy of the will of James W. Danielson, who it appears died in 1886, and bequeathed all of his estate to her; also evidence showing she had paid the taxes on 420 acres of the Reaves tract since 1887; and also the two letters following, from R. O. W. McManus to J. W. Danielson:

"Moss Bluff, Liberty Co., Texas, July 17—77.

"Major Danielson: I wrote you a letter by Capt. Wrexford who was here on the Schooner Whisper. From what he said you have no use for the boat, and wished to sell her, and as money is so scarce, I made you a proposition to give you 420 acres of land adjoining New Sour Lake, even for the boat. The land was granted to me as assignee of J. R. Reeves, title perfect and all taxes paid, and will give a warrantee deed. The land is all heavily timbered and on or near the railroad survey from Sabine to Dallas. Now, if the exchange suits you, or it does not, let me know at once by sending a postal card. I will give you the patent from the state to me. So you will have the claim of title complete. If you conclude to trade, make out a bill of sale to the boat in due form and acknowledge it before a justice, and send the boat and will make deed and send back by them who come with the boat, or I will come and make out the papers at Harrisburg. Please let me know your conclusion.

"R. O. W. McManus.

"The land is of more value than you set on the boat, but I have more land than I can manage, hence will swap even, as I want a boat just now to go to Sabine for lumber for fencing a pasture for my bees.

"McM. Answer at once."

"Moss Bluff, Liberty County, Tex., Aug. 5, '77.

"Mr. J. W. Danielson, Dear Sir: Your postal came and noted. Myself and wife are alone, and it is impossible for me to leave. Now, you say if I will increase the land to 640 you may trade. The 420 acres is really of more value than the boat, but I am 65 years in Dec., and wish to get my land matters closed up, as my children have all left me and will not assist me in paying the taxes. I intend to dispose of them in order to save them the trouble of fighting for them. I have one more small tract of good land and timbered of 213 acres in the same neighborhood, which with 420 acres equals 633 acres, titles perfect and taxes paid to this year, which will be due next Spring. Now, if you will make a bill of sale and in due form before a notary and send the boat to my house, I will make and send you deeds to the two tracts of land duly acknowledged, with the chain of title. I can get a load of ties for her here from M. Huskiel and take to Harrisburg, and the men who brings the boat can run her in that trade a few times, so they will make a little by coming. I am in an out of the way place to get anywhere only by boat, hence I am compelled to have one. Of course I expect the boat to be in good order

and tight, and that you will send everything belonging to her. We are trading on honor more than any other way, as I did not examine the boat when here, was only on deck.

"Yours,

R. O. W. McManus.

"Decide at once, as I may have to go to Waco soon."

It was admitted that R. O. W. McManus died during the year 1883, and that the defendants in the Circuit Court, who are the plaintiffs in error here, are his heirs at law.

After the evidence was submitted the trial judge directed a verdict in the following language: "Gentlemen of the Jury: Under the facts of this case you are instructed to return a verdict for the plaintiff for the land sued for"—and judgment pursuant thereto was accordingly entered.

From this statement it will be apparent that the conflict was the outgrowth of the conditions following: R. O. W. McManus owned all of this land, amounting to 640 acres. It is undeniable that he sold 220 acres off of the south end of said survey to C. A. Parry. Thereafter he also sold to James W. Danielson 420 acres of land, the same being the south part of said survey. The plaintiff in the Circuit Court, claiming under the will of Danielson, maintains that her deed to 420 acres off the south part of said survey must include all of the land which R. O. W. McManus had not sold to Parry. It follows that if this contention is true she is entitled to all of the tract except that to which Parry had title. This would altogether oust the heirs of McManus. The contention of the defendant in error is based upon what is termed by her counsel "an uncertainty as to the identity of the tract of land intended to be conveyed" by the deed from McManus to Danielson. There is, however, no ambiguity in any of the conveyances. The words of description are plain and unequivocal. It is said that the uncertainty arises from extrinsic facts, and that extrinsic evidence is admissible to show this. For this purpose the letters of McManus to Danielson were offered in evidence. There is, however, as stated, nothing ambiguous about these conveyances save the fact that the grantor, R. O. W. McManus, made absolute deeds to different parties, conveying the same tract of land. The deed from McManus to Caroline A. Parry was made many years before that from McManus to Danielson, and conveyed 220 acres off of the south part of the Reaves survey. The subsequent letters of McManus to Danielson, in which he offers to trade 420 acres of land of the Reaves survey for a boat, are, in the first place, incompetent to vary or explain the explicit terms of the conveyance he had previously made to Parry, or that which, with equal explicitness, he had subsequently made to Danielson. But had these letters been admissible, they could not help the defendant in error, for they did not describe or identify the 420 acres to which they related. The evidence that Danielson paid taxes from 1877 to 1886 on 420 acres of land in this survey, if admissible, would be equally indefinite. The question here, in short, is not what R. O. W. McManus intended to convey, but what he actually did convey. In determining this we are restricted to the language of his deed, and since, as we have seen, this is wholly without ambiguity, no extraneous evidence can aid in its construction. This question has been several times be-

fore the Supreme Court of Texas. In the case of *White v. Kingsbury*, 77 Tex. 614, 14 S. W. 201, that court declares:

"If there was a mistake in the description of the land, this could have been corrected by the grantor at the proper time; or if the appellant's rights were affected by such mistake on the part of the grantor, it could have also been corrected in a proceeding for that purpose, with the proper parties before the court; but we do not think it competent, in an action like the present, for the defendant to correct the field notes of the plaintiff's deed upon the ground alleged in the answer, and the evidence offered to establish the alleged error in the conveyance to plaintiff we think was probably rejected."

And in *Watts v. Howard*, 77 Tex. 71, 13 S. W. 966, it is said:

"The deed from Warren to Perkins, through which plaintiff claims, does not convey to the grantee the land in controversy. And it is not competent in an action of trespass to try title to show that it was intended to embrace land not in fact included in the description. If any action had been brought by Perkins against Warren for reformation of the deed, the evidence introduced to show the mistake would have been sufficient to warrant a decree in his favor."

The same principle is adopted by the Supreme Court of the United States in *Parker v. Kane*, 22 How. 1, 16 L. Ed. 286:

"A deed which conveyed 'an undivided fourth part of the following described parcel or tract of land, viz., lots number one and six, being that part of the northeast quarter lying east of the Milwaukee river,' conveys only lots one and six, and not that part of the northeast quarter which is not included within the lots one and six."

These authorities seem conclusive on this subject.

We, of course, do not undertake to say how effective would be a petition in equity on the part of the defendant in error for the reformation of her deed, for that is not involved in this record. In the case of *Prentice v. Stearns*, 113 U. S. 445, 5 Sup. Ct. 547, 28 L. Ed. 1059, which was an attempt in a suit at law to recover under one conveyance an equitable interest of the owner in another tract described by different metes and bounds, Mr. Justice Matthews for the court observed:

"An argument is also addressed to us by counsel for the plaintiff in error in support of the proposition that, if the deed under which he claims title were not effectual to convey the patented land, by reason of a mistaken description, equity would relieve the plaintiff by reforming the deed. But plainly no such question can arise on this record. The proceeding is not in equity to reform the deed, but is at law to recover possession by virtue of an alleged legal title under it. We are dealing with the legal title alone in this action; any equities supposed to control it are not the subject of present consideration, and must be excluded altogether from the discussion."

For these reasons we are of the opinion that the admission by the trial judge of extrinsic evidence to aid the court in the construction of the conveyance from R. O. W. McManus to James W. Danielson and the direction of a verdict for the plaintiff were erroneous. The judgment of the court below is accordingly reversed.

(128 Fed. 657.)

MORNING JOURNAL ASS'N v. DUKE.

(Circuit Court of Appeals, Second Circuit. March 1, 1904.)

No. 97.

1. LIBEL—CONSTRUCTION OF LIBELOUS ARTICLE—JURY QUESTION.

A libelous article appeared with headlines as follows: "Murdered Many for Insurance. Agent Here to Probe into a Horrible Conspiracy. Half a Dozen in It. Most Prominent Business Men of S. Incriminated." Smaller headlines announced the amount of money made by the plotters; that New York insurance companies were selected to be victimized; and that policies were taken on invalids, and when they did not die quickly enough they were poisoned. Below these headlines a panel was formed by a border of stars, making it specially prominent, in which under the title "The Conspirators" six persons were mentioned, including plaintiff. In another panel were given the number of those who died by disease and by poison, and whose lives were attempted, etc. Subheadings distributed through the article read: "How Suspicion was Aroused;" "Had been Killed by Strychnine;" "L. Sentenced to Death;" "Supreme Court Judge Aids J.;" "Given Poison in Whiskey," etc. The narrative in small type fairly imported as a whole that plaintiff was a member of the conspiracy and one of the beneficiaries who profited by the frequent mysterious deaths, which had been brought about by poison, though it directly charged him only with fraudulently issuing policies on bad risks. *Held*, that it was not error to charge as a matter of law that the article imputed to plaintiff the crime of being one of several conspirators who had engaged in obtaining fraudulent insurance upon the lives of decrepit and infirm persons whose death, when disease failed, had been brought about by poison.

2. SAME—PLAINTIFF'S REPUTATION.

In a libel suit it is not error to admit evidence of plaintiff's general social and business standing.

3. SAME—DEFENDANT'S SOURCE OF INFORMATION.

Where, in a suit for publishing a libelous newspaper article, plaintiff seeks to recover exemplary damages by showing that the publication was wanton and reckless, and defendant has been permitted fully to show every particle of information relied on by its reporter when he wrote the article, and the documents which the reporter received from a third person are all admitted, and both he and such third person testify fully as to everything that passed between them, it is not error to exclude evidence of an investigation made by such third person, but of which defendant or its agents were not informed when the article was written and its publication determined on.

4. SAME—ACTS OF Co-CONSPIRATOR.

In a libel suit for publishing an article charging plaintiff with having been a conspirator in a scheme to procure fraudulent life insurance and murder the insured, evidence that two other conspirators had made an attempt to poison one of the insured, and that one of them had been indicted, tried, and convicted for murder, is inadmissible.

5. SAME—INSTRUCTIONS—OTHER OFFENSES.

In a suit for publishing a libelous article charging plaintiff with being a conspirator in a scheme to fraudulently issue insurance policies on the lives of decrepit and infirm persons, and, where they did not die quickly enough, to poison them, it is proper to instruct that if the libel charges plaintiff with murder it is neither a defense nor a mitigation of damages to prove that he was guilty of fraud.

¶ 2. See Libel and Slander, vol. 32, Cent. Dig. § 302.

6. SAME—AMOUNT OF RECOVERY—REVIEW.

Where no instructions were objected to, and no exceptions reserved, an objection to the charge on the subject of exemplary damages cannot be reviewed.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 120 Fed. 860.

This cause comes here upon writ of error to review a judgment of the United States Circuit Court, Southern District of New York, in favor of defendant in error, who was plaintiff below. The action was for libel, and the verdict of the jury awarded \$38,000 damages. A motion was made for a new trial on the ground that the verdict was excessive, whereupon the trial judge carefully reviewed the testimony and the record as it was presented to the jury, and reached the conclusion that "although the defendant justly brought upon itself the severe condemnation of the jury, they visited the offender with too heavy a hand, and exceeded the boundaries of a just discretion," and that a new trial would be granted unless plaintiff stipulated to reduce the recovery to \$20,000. The stipulation was given, and judgment entered accordingly.

Edward M. Shepard, for plaintiff in error.

A. J. Rose, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Many of the assignments of error are concerned with propositions which have already been considered and passed upon by this court in other causes; such assignments may therefore be disposed of by a brief reference to the earlier decisions. It will facilitate the presentation of the cause to discuss the assignments which have been argued here in a somewhat different order from that in which they are presented on the briefs.

1. It is contended that the court erred in refusing to permit the jury to construe the article. This assignment of error is based upon exceptions to portions of the charge and to a refusal to charge. The portions of the charge objected to are as follows:

"That article, in substance, imputed to the defendant the crime of being one of several conspirators who for a number of years, in the state of Mississippi, had been engaged in obtaining fraudulent insurance upon the lives of decrepit and infirm, and, when disease failed, hastening their death by poisoning."

"I may not state the language literally; you have the article, and if I fall into any error you will correct me. The substance of it was that not only did these persons, who were spoken of as the most prominent business men of Scooba, Mississippi, engage in this scheme of fraudulent insurance, but they had carried out the object which they had in view by destroying the lives of the insured."

"The article thus charged the plaintiff with complicity in an atrocious crime or series of crimes."

The defendant requested the court to charge "that it is for the jury to say upon reading the article whether it charges any specific offense against this plaintiff," which was refused.

It is well settled that when there is ambiguity in the language used, so that the alleged libel is capable of being understood in an innocent and harmless as well as in an injurious sense, its true interpretation is a question for the jury; and it is equally well-settled that if, upon an examination of the whole document, it appears to admit of no just con-

struction except one which is injurious to the plaintiff, its meaning is to be determined by the court. *Lewis v. Chapman*, 16 N. Y. 369. Defendant concedes that the article was libelous, since it distinctly charged that plaintiff was guilty of participating in writing fraudulent insurance, but contends that upon a dispassionate and critical reading of the article "the jury might have found that the article in its entirety did not fasten the charge of murder on the defendant in error." The point here raised can be determined only by an analysis of the article in question.

The original is before us. It appears on the seventh page of the issue of Monday July 19, 1897, and is the first article on that page, practically filling three columns. It begins with the following headings, each separated from the one next succeeding it by a dash, printed in capitals of varying size, but all of them conspicuously displayed.

"Murdered Many for Insurance."

"Agent Here to Probe into a Horrible Conspiracy."

"Half a Dozen in It."

"Most Prominent Business Men of Scooba, Miss., Incriminated."

Next follow four more headings, printed in smaller-sized type, separated by dashes, and also arranged so as to challenge the attention of the most casual reader of the paper. They are as follows:

"Seventy Five Thousand Dollars Made By Plotters."

"New York Insurance Companies were Selected for Victimization by the Conspirators."

"Policies Taken on Invalids."

"When They did not Die Quickly Enough to Suit Plotters They were Given Strychnine or Arsenic."

Immediately below this is a sort of panel formed by a border of stars, which makes it especially prominent, and containing the following:

"The Conspirators.

"Dr. W. H. Lipscomb, practitioner, of Scooba, under sentence of death for murder by poison.

"Guy Jack, merchant, indicted for murder by grand jury and out on bail.

"A. A. Hammack, merchant.

"H. Rosenbaum, merchant.

"J. H. Duke, business man of Scooba.

"—— Kramer, business man of Scooba."

It will be observed that the heading stated that there were "half a dozen in it," and that six conspirators are named, of which the plaintiff, Duke, is one. Next follows another similar panel containing this:

"Robinson's estimate of the operation of the crowd:

| | |
|--|----------|
| Policies in which the members appeared as beneficiaries..... | 100 |
| Number who died by disease..... | 30 |
| Number who died by poison..... | 12 |
| Number whose lives were attempted..... | 15 |
| Policies now canceled..... | 60 |
| Amount cleared and divided by the plotters..... | \$75,000 |
| Still to be paid and divided..... | 15,000" |

Then follows another panel containing a letter alleged to have been written by Guy Jack, offering to turn state's evidence. This is succeeded by a long narrative in fine type, broken up by the following sub-headings in small capitals:

"How Suspicion was Aroused."
"Had been Killed by Strychnine."
"Lipscomb Sentenced to Death."
"Supreme Court Judge Aids Jack."
"Given Poison in Whiskey."
"Jack's Cool Admissions."

The narrative begins with the statement that W. D. Robinson, a newspaper publisher of Meridian, Miss., has been in this city [New York] for several days in consultation with the officers of life insurance companies, his object being to bring to light the facts in a frightful conspiracy to defraud insurance companies by insuring invalids and decrepits, and, where disease failed, to hasten the death of the victims by means of poison. It states that some of the most prominent men in Scooba are involved; that one is under sentence of death for murder, and another under indictment for the same crime, while "there are still others in the conspiracy." It then describes how insurances were issued on invalids and decrepits; how suspicion was aroused by "the frequent mysterious deaths that occurred" in Scooba, the beneficiaries being almost invariably "a few citizens prominent socially and in a business way"; how the death of one Stewart induced an investigation which showed he had been killed by strychnine, Guy Jack being the beneficiary under his policies. It then gave an account of the indictment, trial, and conviction of Dr. Lipscomb; the indictment and bailing of Guy Jack; the attempt to kill one Eaves by whisky containing arsenic, for which an indictment was found against Rosenbaum. It concluded with the statement that in proceedings in a certain chancery suit Guy Jack made admissions directly implicating other men in the conspiracy, and quoted the following from his alleged testimony:

"Dr. W. H. Lipscomb was a very handy man for J. H. Duke, A. A. Hammack, H. Rosenbaum, and myself in taking out insurance policies on bad risks for insurance companies." "Did you and Duke and others take out policies on bad risks for insurance companies? I certainly did; and Col. Duke insured an old man, ninety years old, and he was put in for forty-five years old; and Kramer insured a man walking the streets with consumption, a negro, that died in less than thirty days; and A. A. Hammack insured a man that was paralyzed in his bed, and Dr. Lipscomb examined him."

The contention of the defendant is that had the jury been permitted to construe the article they might have found that the only offense charged against the plaintiff was that he victimized insurance companies by procuring the writing of fraudulent policies. If their attention were confined to the narrative in small type, such a conclusion might have been reached, because Duke is there mentioned by name only in connection with the fraudulent insurances, although the narrative, considered as a whole, might be taken as fairly importing that Duke was one of the "others in the conspiracy"—one of the "beneficiaries by the frequent mysterious deaths" which had been brought about by

poison. But the jury would not have been justified in confining their attention to the small-print narrative; the headings were equally a part of the publication, indeed the more prominent part. They speak with no uncertain sound; they admit of no inferences contrary to their positive and unambiguous language. They assert that some prominent business men of Scooba were incriminated in a horrible conspiracy, that the plotters had murdered many persons for insurance, that there were half a dozen in it, and they give the names of the six, among which is found the plaintiff's. A finding of a jury that this publication did not charge the plaintiff with being implicated with others in the murder of many persons by the administration of poison should be set aside as in flagrant disregard of its plain intent and meaning, and there was no error in the excerpts from the charge above quoted.

2. A witness who had known the plaintiff for some 20 years testified that he was well known in Mississippi, and, upon being asked, "What in July, 1897, was his social and business standing?" replied: "I can only answer as to his business standing from reputation. I know nothing from my own knowledge as to his business standing. He had the reputation of having a fine business standing at that time. As to his social standing, I know that to have been excellent. His business standing I could only say from reputation." Defendant duly objected to the question, and reserved an exception. The admissibility of such testimony in an action for libel is in dispute upon the authorities. The question, however, was carefully considered by this court in *Press Publishing Co. v. McDonald*, 11 C. C. A. 155, 63 Fed. 238, 26 L. R. A. 53, and decided in the affirmative. The testimony here was closely confined, as in that case we indicated it should be, "to his general social standing, and not extended to minute details of his life," and the exception to its admission is unsound.

3. It is contended that the court erred in excluding testimony of the witness Robinson. This testimony had been taken by deposition, so that the answers as well as the questions are found in the record. It appeared that the narrative part of the libel—that printed in small type—was prepared by Bertrand, a reporter on the paper. Who prepared the headings was not shown. Bertrand testified that he got his information entirely from Robinson, who at the time was the editor of the *Meridian Herald*; that Robinson showed him some newspaper clippings, some of which he identified, and they were introduced in evidence, one of them being an article published in Robinson's own paper. It may be noted that in this account published in the *Meridian Herald*, much of which was reproduced in defendant's article, there was printed a "card given to the press" by plaintiff, denying any knowledge or connection with the conspirators. No mention whatever of this card, or of plaintiff's denial, appears in the article complained of—a circumstance which the jury no doubt regarded as quite illuminative of the degree of care with which the libelous article was prepared. Bertrand testified that, in addition to giving him the newspaper clippings, Robinson sketched over the case to him, "gave him some facts"—a "general outline of the case"—and told witness "something about his business with the insurance companies." Rob-

inson then testified that he met Bertrand at the time he was leaving for the depot to return to Mississippi; that he gave Bertrand a number of clippings, telling him that witness was in a hurry, and did not have time to go over the case with him, but that he could get out of them what he wanted. The witness added: "He asked me what I had obtained from the insurance companies in New York. I told him I was in a hurry; * * * opened my hand-satchel, and pulled out some memoranda from the insurance companies, and he copied some of it. What he copied I don't know." Thereupon the defendant sought to introduce further testimony of Robinson, which was excluded. The testimony thus excluded was, in substance, that Robinson called on several insurance companies, asked for the Kempner county records and policies, and was shown them; that at the New York Life Company a Dr. Rogers was detailed to assist him, and he spent two hours going over a stack of canceled policies, besides correspondence between the company and its agents, and a confidential report made by Dr. Rogers to the company. He did not state what this examination disclosed.

It was conceded that neither the reporter nor any other of defendant's employes had any personal ill will towards the plaintiff; none of them had ever heard of him before the newspaper clippings were exhibited. The plaintiff sought to prove malice entitling the jury to give exemplary damages solely by showing that the article was published with a wanton and reckless disregard of plaintiff's rights. Defendant was entitled to meet such proof by showing with the utmost fullness everything that was before it connecting the name of the defendant with the acts of which it accused him. It was entitled to show every vestige of evidence, every particle of information, which its reporter had and relied upon when he penned the article. The record shows that defendant was accorded the fullest latitude to make such proof. The documents which the reporter received were all admitted. He was allowed to state, as fully as his counsel chose to ask him, everything that Robinson told him. Robinson was allowed to corroborate him as to everything that passed between them. Except so far as the imperfections of the memory of these two witnesses and the failure of counsel to elaborate the details operated to obscure the recital, the jury had before it a complete and accurate statement of all the information and alleged information which was before defendant when the libel was published. Upon the extent and character of such information the defendant's case in libel suits must stand or fall, because it is always for the jury to say upon such proof whether or not the conduct of the defendant (or of its agent, the reporter) in publishing the libel upon such information was or was not "wanton and reckless." It is the conduct of the defendant's agent that is in question, and it is his environment at the time he acted which is to be shown. The defendant here sought to go much further, and to show that one of the informants of its agent, a person in no way connected with it, and in no way responsible for its decision to publish or refrain from publishing, had himself made an investigation. All statements that such person made to the reporter touching the character and extent of any investigation he had made were competent, but no such statements were excluded.

Defendant, however, was not entitled to have the informant give the details of an investigation he had made, but of which defendant was not informed when it accepted the informant's statements touching the plaintiff as being sufficient proof to warrant the publication of its article, such details not being before defendant's agents when they made their decision to publish, and were not to be considered by the jury when determining whether such decision was or was not, under all the circumstances, "reckless and wanton." "Only such facts are available in mitigation of damages as were known to the defendant at the time of the publication, and which might have influenced him in making the defamatory statements." *Sun P. & P. Co. v. Schenck*, 98 Fed. 929, 40 C. C. A. 163; *Hatfield v. Lasher*, 81 N. Y. 246; *Bush v. Prosser*, 11 N. Y. 347.

The brief contains the statement that the court "refused to permit Robinson to testify * * * as to what information he gave Bertrand." Not content with the references given on the brief, we have carefully read the entire deposition of Robinson, and find nothing therein nor in the bill of exceptions which supports such statement. The exceptions reserved to excluded testimony of this witness are unsound.

4. The next assignment of error is to the exclusion of the deposition of the witness Sam Williams. The evidence tended to show that Rosenbaum and Lipscomb had made an attempt to poison the negro Williams, who had been insured for Rosenbaum's benefit, and passed by Lipscomb. The evidence clearly was not admissible against the plaintiff, Duke.

5. There was no error in excluding the deposition of Reuben C. Jones, which related solely to the indictment, trial, and conviction of Lipscomb. It was not admissible against the plaintiff.

6. It is contended that the court erred in charging as follows:

"It is no defense and does not tend in mitigation of damages that it be shown that the plaintiff has been guilty of other crimes, or has committed other wrongs than those which were imputed to him by the libel. In other words, if a libel charges the plaintiff with the guilt of murder, it is not either by way of defense, or mitigation or reduction of damages, of any value to prove that he was guilty of fraud; and if a man is charged with having procured a policy, or a lot of policies, upon lives with intent to defrauding insurance companies, it is not in the least a defense, or in the least a mitigation of the defendant's conduct in publishing such a libel, to show that he has been guilty of defrauding a fire insurance company."

The charge in this particular was in accord with the rule laid down by this court in *Sun P. & P. Co. v. Schenck*, 98 Fed. 925, 40 C. C. A. 163, and *Tribune Association v. Follwell*, 107 Fed. 646, 46 C. C. A. 526. As stated in those opinions, it is nevertheless open to defendant to show the bad character of the plaintiff in any particular, because one whose character is bad is not entitled to the same measure of damages as one of unblemished fame. And in the case at bar, referring to evidence which had been introduced to show that plaintiff had undertaken unsuccessfully to effect insurance on the life of practically a dying man, the court charged that, if the jury believed such to be the fact, "it does not prove him a party to a conspiracy with a lot of other scoundrels to defraud New York insurance companies by a series of

insurances, and certainly does not prove that he was a conspirator in a scheme of murder; it does reflect upon his character, and the jury are to take it into consideration." Defendant's counsel apparently does not challenge the general rule referred to in the charge. The brief states that "contention is not made that defendant in a libel suit may, for the purpose of either mitigating or reducing damages, show specific acts of immoral or disgraceful conduct disconnected from the libelous charge." It must be borne in mind that the article complained of charged plaintiff with two different offenses—one, the defrauding of insurance companies by taking out policies in his own favor on lives of old and infirm persons; the other, conspiring with others to poison some of the insured, a conspiracy which had already resulted in the murder of 12 persons. The record shows that the fullest opportunity was given the defendant to show that plaintiff had been engaged in defrauding the insurance companies, and a great deal of testimony was introduced bearing upon that issue. And the court charged: "The truth, however nauseating it may be, is always justification for a libel; and the first inquiry which will arise for your consideration is whether the truth of the defamatory statement has been established. If it has, that is the end of the case, and the defendant is entitled to your verdict." The court, in the excerpt given above, wisely cautioned the jury against accepting this evidence (if they credited it) as justifying the whole libel. The fundamental error of the defendant's argument under this point is disclosed in this sentence from the brief: "The sting of the charge [made in defendant's publication] was victimizing insurance companies by fraud." This is a misconstruction of the libel. As pointed out supra, the most venomous part of the article was contained in the headings and panels, which distinctly charged plaintiff with being at least accessory to the murders of a dozen persons. This part of the court's charge was correct, and under the circumstances of the case was certainly called for.

7. Defendant's last point is that the judgment is for excessive damages, and evidences such a degree of prejudice and passion as to require a new trial. It is contended that the court erred in charging the jury on the subject of exemplary damages that "if the article was published in wanton disregard of the plaintiff's rights, if there were a reckless and wanton publication made without due investigation, that is all the evidence of express malice which it is necessary to show." And other passages are cited from the charge, which it is contended prejudiced the jury against the defendant. It will not be necessary to discuss the argument advanced in support of this point, because none of the passages in the charge which are now criticised were objected to at the trial, and no exceptions reserved, and it is not the province of this appellate court to go into the question whether or not damages are excessive, where no exceptions present errors in trying the cause or in charging the jury.

The judgment is affirmed.

(128 Fed. 817.)

BOARD OF COM'RS OF HENDERSON COUNTY, N. C., v. TRAVELERS' INS. CO.

(Circuit Court of Appeals, Fourth Circuit February 2, 1904.)

No. 501.

1. COUNTY REFUNDING BONDS—CONSTITUTIONALITY OF STATUTE—CREATING NEW INDEBTEDNESS.

Act N. C. Feb. 2, 1893 (Pub. Acts 1893, p. 69, c. 70), authorized Henderson county to issue bonds to refund a former issue made in 1874 in aid of a railroad, and provided that such bonds should be deemed a continuation of the liability created by the former issue, and should not "be taken, construed, deemed nor held as the creation of a new debt nor liability." *Held* that, under the law of the state as determined by its Supreme Court prior to its passage, such act did not provide for the creation of an indebtedness, assuming the original bonds to have been valid, and did not, therefore, come within article 2, § 14, of the state Constitution, requiring bills for acts creating or authorizing a state, county, or municipal indebtedness to be read three several times in each house on different days, and the yeas and nays on the second and third readings to be entered on the journals.

2. COUNTIES—AUTHORITY TO SUBSCRIBE TO RAILROAD STOCK.

The fact that, after the passage of an act authorizing counties through which a railroad was projected to subscribe to the stock of the company, such company was consolidated with another, as permitted by the laws of the state, and the name was changed, did not deprive a county of the power to thereafter make a valid subscription to the stock of the company under the new name, nor invalidate bonds issued in payment of such subscription.

3. CONSTITUTIONAL LAW—PROVISIONS OPERATING PROSPECTIVELY ONLY—MANNER OF PASSING STATUTES.

Article 2, § 14, of the Constitution of North Carolina adopted in 1868, requiring acts creating or authorizing state, county, or municipal debts to be passed in a specified manner by the Legislature, did not supersede prior legislation nor affect the validity of acts previously passed, nor did it render invalid county bonds issued thereafter under authority given by an act previously passed without such specified formalities.

4. FEDERAL COURTS—FOLLOWING STATE DECISIONS—VESTED CONTRACT RIGHTS.

County bonds, which were authorized and valid when issued under the law of the state as declared by its Supreme Court in previous decisions, will not be declared invalid in the hands of bona fide holders by a federal court because the state court has since reversed its former rulings.

5. MUNICIPAL BONDS—VALIDITY—ESTOPPEL BY RECITALS.

Where there was statutory authority for a county to issue negotiable bonds, and it has issued such bonds, which have passed into the hands of bona fide purchasers for value, the county is estopped by recitals therein that they were issued in all respects in conformity to the statutes authorizing the same.

6. STATUTES—VALIDITY OF ENACTMENT—RECITALS OF LEGISLATIVE JOURNALS.

Where the recitals in legislative journals relating the passage of a bill show that such bill was introduced and referred to a committee, and that

¶ 4. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

¶ 5. Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.

See *Counties*, vol. 13, Cent. Dig. § 291; *Municipal Corporations*, vol. 36, Cent. Dig. § 1974.

it subsequently passed its second and third readings by a recorded vote, and the act was ratified by the presiding officers, who certified that it had passed three readings, it sufficiently appears that it had a first reading.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

H. S. Henderson and O. V. T. Blythe, for plaintiff in error.

Charles Price, Victor S. Bryant, and J. Crawford Biggs (Wm. B. Smith and R. B. Boone, on the briefs), for defendant in error.

Before SIMONTON, Circuit Judge, and MORRIS and McDOWELL, District Judges.

SIMONTON, Circuit Judge. This case comes up on writ of error to the Circuit Court of the United States for the Western District of North Carolina. The cause below was heard by the court without the aid of a jury. Judgment was entered for the plaintiff below. The defendant sued out the writ of error, and the cause comes before this court on the errors assigned.

The pleadings are voluminous, and their substance will appear in this opinion. The Travelers' Insurance Company, a corporation of the state of Connecticut, brought this action against the board of county commissioners of Henderson county, N. C., as the owner and holder of coupons of the value of \$5,580, cut from the bonds of the denomination of \$1,000, issued by the defendant, 62 of which were held by plaintiff. These 62 bonds were part of an issue of 97 bonds of said defendant on or about 1st July, 1895. In each of the bonds, and as part thereof, is the following recital:

"This bond is one of a series of ninety-seven bonds of like date, tenor, amount and effect as this, numbered consecutively from 1 to 97, both inclusive, said bonds being issued pursuant to, and in accordance with, the power and authority given to the Board of Commissioners of Henderson County by an act of the General Assembly of the State of North Carolina, entitled 'An act to authorize the Commissioners of Henderson County to issue bonds,' ratified the 2nd day of February, 1893, and in accordance with the provisions of an act, amendatory thereof, ratified March 13th, 1895. It is hereby certified that no provision of the Constitution or of the laws of North Carolina is in any wise violated by the issue of said bonds, and it is further certified and declared that all acts, requirements and conditions precedent or otherwise to the issue of said bonds have been duly and fully complied with; that the said bonds are in all respects legal, and that the public faith and credit of the said county of Henderson is hereby pledged for the payment and redemption of the same, and all interest coupons thereon as the same respectively fall due."

The coupons on said bonds had been duly paid semiannually from January 1, 1896, to January 1, 1901. Thereafter payment was refused. Plaintiff avers that it is the bona fide purchaser for value before maturity, in open market, of these bonds. The defendant filed its answer, denying the validity of these bonds, averring that they were unlawfully issued. On this question the case turns.

The issue of 97 bonds, of 62 of which plaintiff below is the holder, was made under the authority of an act of the Legislature of North Carolina, ratified February 2, 1893 (Pub. Acts 1893, p. 69, c. 70), entitled "An act to authorize the commissioners of Henderson county to

issue bonds." This act recites that the county of Henderson, by order of her board of commissioners, had entered, in pursuance of law, in the year 1874, an ordinance authorizing an election, by votes of the county, on the question of issuing bonds in aid of the Greenville & French Broad Railroad Company, afterwards called the Spartanburg & Asheville Railroad; that the election was held, and subscription authorized and bonds issued in aid of said railroad to the sum of \$100,000, interest at the rate of 7 per cent., payable semiannually, the bonds to mature on 1st July, 1895; and that it was desired to fund said bonds in accordance with law. The act then goes on and authorizes the issue of bonds for that purpose, not exceeding \$100,000, payable in 30 years, interest not exceeding 7 per cent. per annum. The second section (page 70) is as follows:

"That the bonds in this act provided for, being intended to be deemed and held a continuation of the liability of Henderson county, created by the provisions of the law, order and election above recited, which authorized the issue of the bonds in aid of the aforesaid railroad, the same shall not be taken, construed, deemed nor held as the creation of a new debt nor liability, but as a continuation of the said debt now existing."

The fifth section (page 70) authorizes the levy of a tax to pay the interest as it accrues.

It is contended that the bonds issued under this act were invalid, because it was not passed in compliance with section 14, art. 2, of the Constitution of North Carolina, which is in these words:

"No law shall be passed to raise money on the credit of the state or to pledge the faith of the state directly or indirectly for the payment of any debt or to impose any tax upon the people of the state, or to allow counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall be on three different days and agreed to by each house respectively and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

This act of February 2, 1893, was not passed in this way. Does this make the bond issue of 1895 invalid? We must keep in mind that "the rights of the holders of county bonds are determined in the federal courts by the law of the state as it was declared by the state court to be at the time the bonds were made and put on the market." *Wilkes Co. v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. These were bonds to refund a debt. An issue of bonds to refund a debt is not the creation of a new debt. It is simply a change of form, renewing and extending a debt already existing. *City of Pierre v. Dunscomb*, 106 Fed. 617, 45 C. C. A. 499; *Rollins & Long v. County Commissioners*, 49 U. S. App. 411, 80 Fed. 692, 26 C. C. A. 91; *Hughes Co. v. Livingston*, 104 Fed. 306, 43 C. C. A. 553. This doctrine has been recognized by the courts in North Carolina. In *Blanton v. Commissioners of McDowell Co.*, 101 N. C. 532, 8 S. E. 162, *Smith, C. J.*, for the court, says:

"It is perfectly manifest that in the issue of the new bonds in the place of those that had matured, it was not intended to surrender any security which the creditor had for the debt by a novation of the one for the other, but to maintain the indebtedness as essentially one and the same in the different forms assumed. * * * The mere renewed recognition of a subsisting lia-

bility in the issue of a new bond, declared in the very act which authorizes the issue 'to be a continuation of the liability' resting upon the county, cannot, upon any sound reasoning, be deemed the creation of a new debt in the sense of its falling under the restrictions applicable to new contracts of indebtedness, with the deprivation of the pre-existent means of enforcing performance by the levy of the necessary taxes."

This case concerned bonds issued to refund other bonds issued in aid of the Western North Carolina Railroad. So, also, in *Broadfoot v. Fayetteville*, 128 N. C. 529, 39 S. E. 20, it was held that funding bonds created no new indebtedness or liability when the rate of interest was not increased. And in *Smathers v. County Commissioners of Madison County*, 125 N. C. 487, 34 S. E. 554, it was held that bonds could be issued to fund necessary expenses of the county, and that they did not come within the provisions of section 14, art. 2, of the Constitution. If, therefore, the original issue of bonds, for the funding of which the act in question provided, was valid, then this act cannot be said to have been passed in violation of this section 14, art. 2, of the Constitution.

Were the bonds originally issued a valid debt on Henderson county? On February 13, 1855 (Priv. Laws 1854-55, p. 269, c. 229), the Legislature of North Carolina passed an act to incorporate the Greenville & French Broad Railroad Company. The first section of the act declared that for the purpose of establishing a communication by railroad from some of the railroads now built or in course of construction in South Carolina along the French Broad valley, across the western part of this state, so as to effect a direct communication between one of said roads in South Carolina and the East Tennessee & Virginia Railroad in East Tennessee, the formation of said company is hereby authorized, which, when formed, shall have corporate existence in each of the states aforesaid, and have all the rights, privileges, and immunities hereafter granted. Then follow 27 other sections, defining and declaring the rights and powers of said company, and a last section, declaring it to be a public act. On February 2, 1857 (Priv. Laws 1856-57, p. 72, c. 77), this act was amended so as to authorize said company to construct the northern portion of said road, extending from Asheville, or some convenient point within two miles thereof, to the state of Tennessee. On February 16, 1859 (Priv. Laws 1858-59, p. 212, c. 166), this act was further amended so as to authorize any of the counties through which said road is intended to pass to subscribe to the capital stock of said company any sum or sums that may be determined on by the court of pleas and quarter sessions of said county, a majority of the justices of the peace of said county being present, and approved by a majority of the lawfully qualified voters of such county, to be ascertained as thereafter provided. Then follow directions how the vote of the people shall be had. The third section authorizes the court, if the majority of the voters of the county approve the subscription, to issue bonds bearing interest not exceeding 7 per cent. per annum, and to levy a tax to meet the interest as it accrues, and to liquidate the principal as it falls due, as they shall judge expedient. No action was taken under this last amendment until 21st July, 1873, when the county commissioners of Henderson county, by

an order reciting that they are acting under this amendment of 1858-59, recommended to the voters of Henderson county that they authorize a subscription to the capital stock of this company, then and thenceforward known as the "Spartanburg & Asheville Railroad Company." The election was held on 7th August, 1873, and the result of the vote was in favor of the subscription. Thereupon the board directed their chairman to make the subscription, and the bonds were issued to the extent of \$100,000, bearing interest at 7 per cent. per annum, the bonds being payable 1st July, 1895, and each reciting that it was issued in aid of the Spartanburg & Asheville Railroad Company. It is true that the bonds were to be issued as a subscription to the Greenville & French Broad Railroad Company. This company afterward consolidated with a railroad in South Carolina, and the name of the consolidated company became the Spartanburg & Asheville Railroad Company. The statutes of North Carolina (chapter 138, p. 186, Pub. Laws 1871-72) authorized a consolidation of this character, and, among other things, provided (section 61) that on such consolidation "all stock subscriptions and other things in action belonging to either of said corporations shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed." The consolidation is admitted in the agreed statement of facts in the record. The statute of North Carolina is in accord with the general law. *County of Livingston v. The Bank*, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. Ed. 359; *Scotland County v. Thomas*, 94 U. S. 688, 24 L. Ed. 219. The railroad passed through Henderson county. Under a Constitution of the state of North Carolina adopted in 1868, a board of county commissioners was established in each county, which took the place of and succeeded to all the powers and duties of the court of pleas and quarter sessions. *Belo v. Commissioners of Forsythe*, 76 N. C. 489; *Wilkes County v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. At the time of the passage of the amendment of 1858-59 there was no constitutional provision limiting and qualifying the power of the Legislature in the passage of an act like this. Unless the act was repealed or superseded, it remained in full force and effect when in 1873 the election was ordered and in pursuance thereof the bonds were issued. There is no act on the statute book repealing this amendment in terms.

But it is said that this act was repealed by article 2, § 14, of the Constitution of North Carolina adopted in 1868, and set out supra. It will be noticed that the language of this section of the Constitution is in the future. No law "shall" be passed, etc. The courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no doubt that such was the intention of the Legislature. *Chew Heong v. United States*, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871. The Supreme Court of the United States has held that a change in a state Constitution, relating to municipal subscriptions, is not retroactive so as to have any controlling application to laws in existence when the Constitution was adopted. It does not destroy a vested right of a corporation to receive bonds of a municipal corporation although they are not issued. *Dallas Co. v. Mc-*

Kenzie, 110 U. S. 686, 4 Sup. Ct. 184, 28 L. Ed. 285; County of Ray v. Vansycle, 96 U. S. 675, 24 L. Ed. 800; County of Schuyler v. Thomas, 98 U. S. 169, 25 L. Ed. 88. In the County of Scotland v. Thomas, 94 U. S. 688, 24 L. Ed. 219, the court construed a section of the Constitution of Missouri in these words:

"The General Assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless," etc.

As to this the court says:

"This provision, it will be observed, is against the Legislature authorizing municipal subscriptions or aid to private corporations. It does not purport to take away any authority already granted. It only limits the power of the Legislature in granting such authority for the time to come."

The Constitution of 1868 (article 4, § 19) declared the laws of North Carolina not repugnant to this Constitution or the Constitution of the United States shall be in force until legally changed, unless inconsistent with the provisions of this Constitution.

There are two cases in the Supreme Court of North Carolina which tend to show that this section 14, art. 2, of the Constitution, was not intended to supersede previous legislation. The convention which adopted the Constitution had, previous to its adoption, passed an ordinance on 9th March, 1868, authorizing a subscription in aid of the Northwestern North Carolina Railroad Company by the county of Forsythe. The election under that ordinance took place 4th April, 1868. The Constitution was ratified April 24, 1868. The subscription pursuant to the election was made in June, 1878. The validity of the subscriptions and of the bonds was tested in *Hill v. Commissioners of Forsythe County*, 67 N. C. 367, and they were sustained. Thus the Constitution was held not to have superseded the previous legislation. The same point was decided in *Belo v. Commissioners of Forsythe County*, 76 N. C. 489. These cases were decided in 1872 and 1877, respectively, and were not questioned at the time of the issue of the bonds for which the bonds in this suit were funded.

It is contended, however, that the act of 1858-59 conflicts with the Constitution in that it provides that the stock subscription must be authorized by a majority of the qualified voters, whereas the act required a majority of the votes cast. It is admitted, however, that the original bonds were voted for by a majority of the qualified voters. In *Wood v. Oxford*, 97 N. C. 228, 2 S. E. 653, *Rigsbee v. Town of Durham*, 98 N. C. 81, 3 S. E. 749, and *Rigsbee v. Durham*, 99 N. C. 341, 6 S. E. 64, it is decided that, if the fact appear that the subscription was voted for by a majority of the qualified voters, the defect in the law is cured.

It is also said that the act was repealed by Battle's Revisal. This revisal was approved by Act Feb. 20, 1873. In section 8 of the revisal (page 862, c. 121) it is provided:

"No act of a private or local nature; no act containing a grant of corporate privileges or imposing duties on any particular county inconsistent with the general provisions of law, shall be construed to be repealed by the second section of this chapter."

Again, the repeal is to be of force from and after 1st January, 1874. The election in Henderson county was provided for 21st July, 1873, was held August, 1873, and subscription made November, 1873. So rights had accrued.

It would seem, therefore, that the validity of the original issue of bonds can be sustained under the amendment of 1858-59. In addition to this, the authority to make the subscription to this railroad can be found in section 2, c. 171, p. 417, of the Public Laws of North Carolina, brought forward as section 1997 of the Code of North Carolina 1883, as follows:

"The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company and whether in bonds, money or other property, and thereupon the board shall order an election to be held on a notice not less than thirty days for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company. Provided that the counties, in the manner aforesaid, shall subscribe from time to time such amounts either in bonds or money as they may think proper."

The record shows, by extract from the minutes of the county commissioners of Henderson county, that on 21st July, 1873, they unanimously resolved to recommend to the qualified voters of Henderson county the subscription of \$100,000, in county bonds and coupons attached, to the capital stock of the Greenville & French Broad Railroad Company, for which an annual tax was to be levied, the bonds to mature at the end of 20 years, and to bear 7 per cent. interest. The board of county commissioners ordered that the question of subscription be submitted to the vote of the people of the county. The election was regularly held, the subscription approved by the people, and the subscription made. The conditions of the subscription were that no bonds be issued until all the stock of the road was subscribed; that the whole subscription be expended for work and labor done in Henderson county, and not elsewhere; that no bonds be issued until the road is let out and in progress of construction in said county; that the road should run through the town of Hendersonville, and a depot be located within the corporate limits; and that the bonds be issued as the exigencies of the case required.

Certain cases decided by the Supreme Court of North Carolina recently have held that neither this act of the Legislature, nor the sections of the Code in which it was incorporated, authorized subscriptions of this character. But the Supreme Court of the United States, and this court in *Wilkes County v. Coler*, 180 U. S. 531, 21 Sup. Ct. 458, 45 L. Ed. 642, *Stanley County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126, and *Commissioners v. Coler*, 113 Fed. 705, 51 C. C. A. 379, and *Id.*, 113 Fed. 725, 51 C. C. A. 399, have held that these later decisions do not control the validity of bonds issued

prior to their rendition which were valid under previous decisions of North Carolina of force when they were issued. These recent cases above referred to are *Wilkes County v. Call*, 123 N. C. 308, 31 S. E. 481; *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711; *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539. The reason is obvious. The federal courts sustained the subscriptions made under decisions of the Supreme Court of North Carolina unreversed and in force at their date. It was held that the contracts made under these circumstances could not be invalidated by subsequent decisions. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Folsom v. Ninety-Six*, 159 U. S. 624, 16 Sup. Ct. 174, 40 L. Ed. 278.

We lay no stress upon the case of *Henderson County v. Williams*, decided very recently in the superior court of Henderson county, N. C., holding these bonds invalid. No bondholder was a party to this suit. It was wholly between county officers, and cannot be treated as *res judicata*. The same rule applies to the original bonds issued by Henderson county, to refund which the bonds in question in this case were issued. These original bonds each bear this statement:

"The Commissioners of the County of Henderson regularly represent the body of the county aforesaid, having made a corporate subscription to the capital stock of the Spartanburg & Asheville Railroad Company, which stock, with the dividends accruing thereon, is in the hands of trustees for the holders of said bonds and pledged for the payment of the said bonds and having ascertained the sense of the qualified voters thereof to favor a corporate subscription to the capital stock of the said railroad company by an election duly held for that purpose, having caused these bonds to be issued to meet the instalments due upon the county subscription to said company, and the whole is done under the authority conferred and in conformity with the Constitution of the State of North Carolina, and by the authority of the acts of the General Assembly of said State."

These recitals are conclusive, constituting an estoppel in pais upon the county which issued them. *Moran v. Miami Co.*, 2 Black, 722, 17 L. Ed. 342. "Where bonds of a county on their face import a compliance with the law under which they were issued, the purchasers are not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them, and the county is estopped to deny, as against bona fide purchasers, that such conditions have been complied with." *Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 208, followed by a long line of decisions down to *Northern Bank of Toledo v. Porter Township*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258. The only duty of a bona fide holder is to see that there is legislative authority to issue the bonds. *Douglas County v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79.

It is objected that the act of the session of 1868-69, ratified April 10, 1869, was not passed in conformity with the Constitution. The parts of the journals of the two houses are in the record. These journals show that on the second and third readings of the bill the ayes and nays were taken and recorded as required by the Constitution. But it is said that the journals do not show that the bill had a first reading. The bill was entitled "A bill to authorize the sev-

eral counties in the state to subscribe to stock in railroad companies." This is the copy of the House journal:

"Mr. Malone introduced a bill to authorize the several counties in the state to subscribe to stock in railroad companies, February 17, 1869, referred to committee on counties and townships."

On February 27, 1869, on motion of Mr. Malone, the rules were suspended, this bill taken up, and passed its second reading by aye and nay vote recorded. On March 1, 1869, on motion of Mr. Malone, the rules were suspended, and this bill taken up and passed its third and final reading by a recorded aye and nay vote. The Senate Journal, 4th March, 1869, shows that this bill was received from the House, read a first time, and referred. It was reported favorably on 6th March, and passed its second reading on 13th March, by a recorded aye and nay vote. On 29th March, 1869, it passed its third reading by a recorded aye and nay vote. No one having even a slight acquaintance with parliamentary proceedings but knows that, when a bill is introduced and referred, it must have had at least one reading. Beside this, this act was duly ratified, and the certificate of the presiding officers shows that it has had three readings in each house. The journal shows that it has had a second reading. The conclusion is inevitable that it must have had a first reading. In *Black v. Commissioners*, 129 N. C. 126, 39 S. E. 819, the court says:

"As to the manner of its passage, it appears that the ayes and nays were duly entered on the journals upon the second and third readings, on two several days in each house, as required by Const. art. 2, § 14. The ratification is conclusive evidence that it was read three several times in each house." *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. Rep. 801.

It is gravely contended by the counsel for plaintiff in error that, when this journal states that the rules were suspended, it is meant that the rules were suspended which required a full reading of the bill. There is nothing to sustain this assumption. The journal states that thereafter the bill received a second reading. The presumption that bodies like a legislature have followed the law always exists. The contrary must be proved.

When it is considered that the original bonds were issued in 1875; that their coupons were regularly paid for 20 years; that the bonds were called in and funded in the bonds in question in this suit, the coupons of which were paid regularly until 1st January, 1901; that the money derived from the sale of the bonds was expended in work and labor done in Henderson county; that this road was completed through that county and its county seat, Hendersonville, putting this remote mountain village and county in touch with the world; and that this town and county have been enjoying all these advantages for over 30 years—we can see no merit in the defense. The language of Mr. Justice Peckham in *Tulare District v. Shepard*, 22 Sup. Ct. 534, 46 L. Ed. 773, is not inappropriate:

"In the case of *Douglas County v. Bolles*, 94 U. S. 104 [24 L. Ed. 46], this court said: 'Common honesty demands that a debt thus incurred should be paid.' That statement has lost no force by the lapse of time, and we think

it applies in its full strength in this case. Unless there is some settled rule of law which prevents recovery in this action, the judgment under review should be affirmed."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

(128 Fed. 826.)

LEVIN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1904.)

No. 1,909.

1. CONSTITUTION—CONSTRUCTION—NATURALIZATION—STATE COURTS MAY GRANT.

Under the congressional authority to establish a uniform rule of naturalization, granted by section 8 of article 1 of the Constitution, the Congress may lawfully empower courts of the states to admit qualified aliens to citizenship, and the courts of the states may legally exercise this power without legislative authority or permission from the states which created them.

2. SAME—CONSTRUCTION BY CONTEMPORANEOUS INTERPRETATION—LONG ACQUIESCENCE AND PRACTICE CONCLUSIVE.

The contemporaneous construction of a provision of the Constitution by those who framed it, the concurrence of statesmen, legislators, and judges in that construction, and the acquiescence and uninterrupted practice of all the departments of the government in the same interpretation for more than 100 years, conclusively determine the meaning and effect of the provision, and place it beyond the realm of doubt or debate.

3. SAME—AUTHORITY OF CONGRESS TO GRANT JUDICIAL POWER.

The judicial power granted by section 1, art. 3, of the Constitution, is the power to try the 10 classes of cases specified in section 2 of that article. *Chisholm v. Georgia*, 2 Dall. 475, 1 L. Ed. 440.

These sections do not prohibit the Congress from vesting judicial power in other cases in courts or magistrates of the states or in executive officers, where the exercise of such power by them is a necessary or appropriate means by which to use the powers granted by the Constitution to the legislative department or to the executive department of the government.

4. NATURALIZATION—COURTS HAVING COMMON-LAW JURISDICTION DEFINED.

Courts having common-law jurisdiction, within the meaning of that term in section 2165, Rev. St. [U. S. Comp. St. 1901, p. 1329], are those which have the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law, or courts which are governed by the principles, rules, and usages of the common law in the determination of some of the causes of which they have jurisdiction. The term is used to distinguish courts which have some common-law jurisdiction from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law.

It is not indispensable that a court should have all common-law jurisdiction to qualify it to naturalize aliens under this section. It is sufficient that it has some.

5. SAME—ST. LOUIS COURT OF APPEALS.

The St. Louis Court of Appeals has common-law jurisdiction, and is empowered to admit qualified aliens to citizenship, because it has common-law jurisdiction to issue, hear, and determine writs of habeas corpus, quo warranto, mandamus, and certiorari, and in the determination of actions at law it is generally governed by the principles, rules, and usages of the common law.

(Syllabus by the Court.)

In Error to the District Court of the United States for the Eastern District of Missouri.

Walter D. Coles, for plaintiff in error.

Bert. D. Nortoni (David P. Dyer and Horace L. Dyer, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. Nathan Levin was indicted, tried, convicted, and sentenced to imprisonment for the term of five years by the United States District Court for the Eastern District of Missouri, for aiding, abetting, counseling, advising, and procuring aliens who were not entitled to naturalization to obtain certificates of citizenship from the St. Louis Court of Appeals by means of fraud and false statements, in violation of sections 5425 and 5427 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3669, 3670]. He challenges the judgment against him upon the ground that these acts constituted no offense, because the St. Louis Court of Appeals had no jurisdiction to naturalize qualified aliens.

By section 2165 of the Revised Statutes [U. S. Comp. St. 1901, p. 1329], "a court of record of any of the states having common law jurisdiction and a seal and clerk" is expressly authorized by the Congress to naturalize qualified aliens, and to issue to them certificates of citizenship. The Constitution of the United States provides that the Congress shall have power "to establish a uniform rule of naturalization * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof" (article I, § 8), and that "this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding" (article 6). The constitutional grant of power to do an act or to attain an end is an implied grant of plenary authority to select and use the appropriate means to accomplish the purpose contemplated. *McCulloch v. Maryland*, 4 Wheat. 316, 413, 422, 4 L. Ed. 579; *Prigg v. Pennsylvania*, 16 Pet. 536, 618, 619, 10 L. Ed. 1060. A thoughtful reading of these clauses of the Constitution, in the light of the familiar canon of construction to which reference has been made, suggests no lack of authority in the legislative department of the nation to grant, or in the courts of the states to accept and to exercise, the power to naturalize aliens bestowed upon them by the act of Congress.

Counsel for the plaintiff in error, however, contends with much cogency and ingenuity that a court of a state has no jurisdiction to admit aliens to citizenship (1) because Congress had no power under the Constitution to grant this authority to such a court; and (2) because, if it had that power, a court of common-law jurisdiction created by a state has no authority to accept or to exercise this power in the absence of legislative permission so to do from the state which established it. His argument in support of his first position runs in this

way: The Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish" (article 3, § 1), and that "the judicial power shall extend to all cases" specified in article 3, § 2. Congress has no authority to grant any portion of this judicial power of the nation to any other courts than those created under these sections of the Constitution. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328-330, 4 L. Ed. 97; *Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19. The admission of aliens to citizenship is a judicial function. It is the exercise of judicial power. *Spratt v. Spratt*, 4 Pet. 393, 407, 7 L. Ed. 171. Therefore the Congress has no power to grant to a court of a state the judicial power to admit aliens to citizenship, and section 2165 and all other acts of Congress which by their terms bestowed this authority upon state courts are unconstitutional and void. In support of his second proposition he argues that a court of a state derives all its powers from the political entity which creates it; that, while such a court may perform judicial functions permitted by national legislation in cases in which the general power to discharge these functions is granted or allowed to it by the legislation of the state which creates it, no new or additional authority can be conferred upon it by the laws of the nation, and none can be exercised by it unless it is granted by the state laws which create the court, and vest and define its jurisdiction, and, inasmuch as the legislation of the state of Missouri has never granted to any court of that state the power or the permission to naturalize aliens in accordance with the laws of the United States, none of the courts of that state may lawfully exercise this authority. To sustain this argument he cites the decisions of the Supreme Court to the effect that where jurisdiction may be conferred upon the national courts by Congress, and that jurisdiction is not made exclusive, the state courts may exercise it if by the Constitution and laws of their state they are competent to take it (*Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19; *Clafin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833); the cases in which state courts have declined to sustain actions for fines, penalties, or forfeitures imposed by acts of Congress for the violation of national legislation (*U. S. v. Lathrop*, 17 Johns. 4, 8-10; *Ely v. Peck*, 7 Conn. 239, 244); and the case of *Ex parte Knowles*, 5 Cal. 300, in which the Supreme Court of that state held that, while Congress had no power to confer jurisdiction upon the courts of a state to admit aliens to citizenship, yet such courts might exercise that power in cases where its existence was recognized by the legislation of the state which established it.

These propositions and arguments of the counsel for the plaintiff in error are plausible and cogent. They might well have challenged debate—possibly they might have changed the course of legislation and of action—if they had been presented to the Supreme Court 100 years ago. At this late day, however, after the courts of the states have for more than a century, with the uniform acquiescence and consent of all the departments of the national government and of the state governments, exercised this authority to naturalize aliens granted to them by the acts of Congress, there is one answer which is equally fatal to both the propositions which counsel for the plaintiff in error here pre-

sents. It is that the contemporaneous interpretation of the provisions of the Constitution relative to this subject by those who framed it, the concurrence of statesmen, legislators, and judges in that construction, the acquiescence and uninterrupted practice of all the departments of the government in the same interpretation for more than 100 years, conclusively determine their meaning and effect, and place them beyond the realm of doubt or question. *Stuart v. Laird*, 1 Cranch, 298, 308, 2 L. Ed. 115; *Cohens v. Virginia*, 6 Wheat. 265, 419, 5 L. Ed. 257; *Prigg v. Pennsylvania*, 16 Pet. 539, 620, 621, 10 L. Ed. 1060; *Ex parte Gist*, 26 Ala. 156, 164; *Dean v. Borchsenius*, 30 Wis. 237. In the year 1790 the Congress passed the first act to establish a uniform rule of naturalization. That act empowered any common-law court of record in any one of the states to admit aliens to citizenship upon their compliance with the terms of the law, but gave no such authority to any court of the United States. 1 Stat. 103. Many of the statesmen who sat in the convention which framed the Constitution were members of the Congress which passed this law. This act of Congress is therefore a contemporary interpretation—a practical exposition of the meaning and effect—of the grant to Congress of the power to establish a uniform rule of naturalization by the very men who, as the representatives of the people of the United States, gave this authority to the legislative department of the national government. From the day when this act gave the courts of the states the power to issue certificates of citizenship to qualified aliens to the present moment, through all the legislation and judicial action of more than a century, that grant to the state courts has been maintained undisturbed, and the power thus bestowed has been exercised by the courts of the states with the uninterrupted acquiescence of the legislative, executive, and judicial departments of the nation and of the states. 1 Stat. 414; Act April 14, 1802, c. 28, 2 Stat. 153, 155; Rev. St. § 2165; U. S. Comp. St. p. 1329; *Clafin v. Houseman*, 93 U. S. 130, 140, 23 L. Ed. 833; *Robertson v. Baldwin*, 165 U. S. 275, 279, 17 Sup. Ct. 326, 41 L. Ed. 715. This contemporaneous, continuous, and uniform affirmance of the constitutionality of the grant to the state courts of this power to naturalize aliens, and this uninterrupted practice of the state courts to exercise the power thus bestowed upon them, are too long-continued, too strong, too obstinate, to be controlled or shaken now. It is too late to question the constitutionality of the devolution of this authority upon the courts of the states, or their jurisdiction to exercise it. Those issues have been settled by prescription and practice, and they are no longer open to debate or question.

Nor are the conclusions which contemporaneous construction, time, and practice have adopted without cogent reasons to support them. While it is true that Mr. Justice Story, speaking for the Supreme Court, declared in 1816, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328-333, 4 L. Ed. 97, that the Congress could not vest any portion of the judicial power of the nation in courts which it did not itself ordain and establish, and this statement has since been repeated, the fact is that he was then thinking and speaking of the judicial power granted by section 1, and defined by section 2, of article 3 of the Constitution. The better opinion now is that the judicial power granted by the former

section, which may be vested in the national courts only, is defined in the latter section; that it necessarily extends only to the trial of "all cases in law and equity arising under this Constitution," and to the trial of the other nine classes of cases named in section 2, and specified by Chief Justice Jay in his opinion in *Chisholm v. Georgia*, 2 Dall. 419, 475, 1 L. Ed. 440 (*Ex parte Gist*, 26 Ala. 156, 162; *Clafin v. Houseman*, 93 U. S. 130, 139, 23 L. Ed. 833; *Robertson v. Baldwin*, 165 U. S. 275, 279, 17 Sup. Ct. 326, 41 L. Ed. 715); and that these sections neither expressly nor impliedly prohibit the Congress from conferring judicial power upon other courts, or upon executive or other officers, in other cases, where, in its opinion, the devolution of such power is either necessary or convenient in the execution of the authority granted to the legislative or to the executive department of the government through the Constitution. Thus the authority granted to territorial courts to hear and determine controversies arising in the territories of the United States is judicial power. But it is not a part of that judicial power granted by section 1, and defined by section 2, of article 3 of the Constitution. Nevertheless, under the constitutional grant to Congress of power to "make all needful rules and regulations respecting the territory * * * belonging to the United States" (article 4, § 3), that body may create territorial courts not contemplated or authorized by article 3 of the Constitution, and may confer upon them plenary judicial power, because the establishment of such courts and the bestowal of such authority constitute appropriate means by which to exercise the congressional power to make needful rules respecting the territory belonging to the United States. *American Ins. Co. v. Canter*, 1 Pet. 511, 544, 7 L. Ed. 242; *Clinton v. Englebrecht*, 13 Wall. 434, 447, 20 L. Ed. 659; *McAllister v. U. S.*, 141 U. S. 174, 184, 188, 11 Sup. Ct. 949, 35 L. Ed. 693. Of the same nature is the judicial power conferred upon the Secretary of the Interior, the Commissioner of the General Land Office, and his subordinate officers, to hear and determine claims to the public lands of the nation (*U. S. v. Winona & St. Peter R. Co.*, 67 Fed. 948, 957, 15 C. C. A. 96, 104); that bestowed upon justices of the peace and other magistrates of the states by Act Sept. 24, 1789, c. 20, § 33, 1 Stat. 91, to arrest and commit or bail persons charged with a violation of the criminal laws of the United States (*Ex parte Gist*, 26 Ala. 156, 164); that conferred upon the state courts to hear and determine suits by or against corporations and officers created by the nation (*Bank of the United States v. Deveaux*, 5 Cranch, 61, 3 L. Ed. 38; *Clafin v. Houseman*, 93 U. S. 135, 23 L. Ed. 833); that given to magistrates of any county, city, or town corporate to hear, determine, and certify the claims of owners of fugitive slaves under Act Feb. 12, 1793, c. 7, 1 Stat. 302, § 3 (*Prigg v. Pennsylvania*, 16 Pet. 536, 615, 620, 621, 10 L. Ed. 1060); that bestowed upon justices of the peace to arrest, commit to jail, and deliver to the master deserting seamen, under Act July 20, 1790, c. 29, 1 Stat. 131, 134 (*Robertson v. Baldwin*, 165 U. S. 275, 277, 280, 17 Sup. Ct. 326, 41 L. Ed. 715); that conferred upon the courts of the states by the various acts of Congress which empower them to naturalize aliens (1 Stat. 103, 414; 2 Stat. 153, 155; Rev. St. § 2165; *Robertson v. Baldwin*, 165 U. S. 27, 17 Sup. Ct. 326, 41 L. Ed. 715; *Clafin v. Houseman*, 93 U. S. 130, 140, 23 L. Ed. 833; In

the Matter of Martin Conner, 39 Cal. 98, 101, 2 Am. Rep. 427); and that granted by acts of Congress to executive officers of the United States to courts and magistrates of the states in numerous other instances, not to try and determine the cases specified in section 2 of article 3 of the Constitution, but to perform the judicial function of hearing and determining other questions and issues which a proper exercise of the powers granted to the various departments of the government require to be thus decided. The grant by the Congress of the United States of the judicial power to admit aliens to citizenship, and to hear and decide the various questions which do not arise in the cases specified in article 3 of the Constitution, but which a proper exercise of the powers granted by that instrument to the executive or to the legislative department of the Government requires to be judicially decided, was neither expressly nor impliedly prohibited by that article. The congressional power to make such a grant, and to vest judicial authority in state courts and officers, in such cases, exists by virtue of the established rule that the grant of a power to accomplish an object is a grant of the authority to select and use the appropriate means to attain it.

Nor does the contention that the courts of the state of Missouri having common-law jurisdiction are without authority to accept or to exercise the judicial power to naturalize aliens conferred upon them by Congress, because the state which established them has never by any legislative action empowered or permitted them to do so, commend itself to our judgment. The suggestion is noted that the Legislature of a state might prohibit its courts from exercising the power to naturalize aliens, and that this prohibition would be fatal to the devolution of the congressional authority. No such inhibition, however, has been imposed upon the courts of Missouri, and it is unnecessary and would be injudicious to consider and determine in this case what the effect of such legislation might be. That question is not here for consideration. The state of Missouri was admitted to the Union and became a part of this nation in the year 1820. More than 30 years before its admission the Constitution of the United States had empowered Congress to establish a uniform rule of naturalization, and to make all laws necessary to carry that authority into execution. In the exercise of this power, Congress had enacted laws which conferred upon certain courts of the states and territories the judicial power to issue certificates of citizenship to qualified aliens. The Constitution provided that "this Constitution and the laws which shall be made in pursuance thereof * * * shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution and laws of the state to the contrary notwithstanding." When the United States offered admission to the Union to the people of Missouri, it made this offer subject to the patent condition that the Constitution of the United States, and the laws that had been made and should be made by Congress in accordance with its provisions, should become the supreme law of the new state, binding alike upon all its inhabitants, whether laymen or lawyers, citizens or judges. The people of Missouri accepted this offer and its condition, and became a part of the nation. Thereupon the Constitution of the United States, and the laws

enacted in accordance with it, which then conferred upon the courts of the states the judicial power to admit aliens to citizenship, became a part of the supreme law of the new state of Missouri, which the people of that state, by their acceptance of the offer of admission, had contracted should be obeyed and executed by the citizens, the judges, and the courts of their state. The acceptance by the people of Missouri of this offer of admission, in view of the power which had then been granted by the Congress to certain courts of the states to admit aliens to citizenship, and in view of the practice of those courts to exercise this jurisdiction, which had then prevailed for nearly three decades, gave to the courts of Missouri plenary jurisdiction to exercise any power to admit aliens to citizenship which the Congress had then conferred or might thereafter bestow upon them under the provision of the Constitution applicable to that subject. *Clafin v. Houseman*, 93 U. S. 130, 136-142, 23 L. Ed. 833; *Ex parte Gist*, 26 Ala. 156, 164; *Prigg v. Pennsylvania*, 16 Pet. 536, 620, 10 L. Ed. 1060; *Robertson v. Baldwin*, 165 U. S. 275, 280, 17 Sup. Ct. 326, 41 L. Ed. 715. The irresistible conclusion is that the Congress of the United States was by section 8, art. 1, of the Constitution, granted the necessary authority to vest in the courts of the states having common-law jurisdiction the judicial power to admit qualified aliens to citizenship; that, in the absence of legislative authority or permission from the states which created them, such courts may lawfully exercise this power, and that section 2165 of the Revised Statutes is neither unconstitutional nor invalid.

Finally it is insisted that section 2165 of the Revised Statutes did not confer jurisdiction upon the St. Louis Court of Appeals, because it is a court of appellate, and not of original, jurisdiction, and because it is not a court having common-law jurisdiction. The act of Congress does not limit its grant to courts of original jurisdiction, but extends it to all courts of record which have common-law jurisdiction, seals, and clerks. As Congress did not except appellate courts from the beneficiaries of this grant, it is neither the province nor the duty of the courts to do so. The remaining question is, has the St. Louis Court of Appeals common-law jurisdiction? Courts having common-law jurisdiction, within the meaning of this section, are those which have the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law, or which, in the determination of the causes which they decide, are governed by the principles, rules, and usages of that law. The term "having common-law jurisdiction" is used to distinguish these courts from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law. *U. S. v. Lehman* (D. C.), 39 Fed. 49, 50; *Parsons v. Bedford*, 3 Pet. 446, 447, 7 L. Ed. 732; In the Matter of Martin Conner, 39 Cal. 98, 101, 2 Am. Rep. 427; *People ex rel. v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254. Courts which have some common-law jurisdiction are courts having common-law jurisdiction, and it is not indispensable to the qualification of a court under this act of Congress that it should have all the common-law jurisdiction, or even that it should have general common-law jurisdiction. *Ex parte Tweedy*, 22 Fed. 84; In the Matter of Martin Conner, 39 Cal. 98, 101,

2 Am. Rep. 427; U. S. v. Power, 14 Blatchf. 223, Fed. Cas. No. 16,080, 27 Fed. Cas. 607, 608; Ex parte Gladhill, 8 Metc. (Mass.) 168, 170. The common law of England and all the statutes and acts of Parliament made prior to the fourth year of James I constitute the rule of action and decision of all the courts of the state of Missouri, wherever they are not inconsistent with the Constitution of the United States, the Constitution of the state, or the statutes in force for the time being. Rev. St. Mo. 1899, § 4151. The St. Louis Court of Appeals is an appellate court vested with appellate jurisdiction to review the decisions of the inferior courts of certain counties of the state of Missouri in cases in which the amount involved does not exceed \$4,500, and with original jurisdiction to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other remedial writs, and to hear and determine the same. Const. Mo. art. 6, § 12; Rev. St. Mo. 1899, p. 92; Laws Mo. 1901, p. 107; State ex rel. Schierberg v. Green, 1 Mo. App. 226, 227. The writs of habeas corpus, quo warranto, mandamus, and certiorari are common-law writs, and in the issue, the hearings, and decisions upon them the St. Louis Court of Appeals necessarily has and exercises common-law jurisdiction. In the hearing and decision of actions at law presented to it for review, its rule of action and decision must in the great majority of cases be the rules, principles, and usages of the common law. Hence it is a court having common-law jurisdiction, and it falls in the class of state courts upon which Congress had conferred the jurisdiction to admit qualified aliens to citizenship. The aiding, the abetting, the counseling, advising, or procuring, aliens who are not entitled to naturalization to obtain certificates of citizenship from this court by fraud and false statements, is one of the offenses denounced by section 5427 of the Revised Statutes, and there is no escape from the conclusion that the judgment below must be affirmed. It is so ordered.

(128 Fed. 833.)

LEE v. WYSONG et al.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,307.

1. PARTITION—NATURE OF ACTION—TITLE TO SUPPORT.

Where a proceeding for partition is one at law, in which questions of title may be tried, as it appears to be under the law of Texas, on the trial of such an action in a federal court the legal title must prevail.

2. VENDOR AND PURCHASER — UNRECORDED INSTRUMENT — BONA FIDE PURCHASER.

Certain tracts of land in Texas were conveyed to two individuals, who were at the time partners. In 1853 an act of sale was executed by one partner to the other, in New Orleans, covering all his interest in the partnership property, "consisting of the stock in trade * * * real estate taken by the said firms from their debtors in settlement of their debts and situate in the states of Mississippi and Texas. * * *". Such instrument was not sufficient as a conveyance of lands under the laws of Texas, nor was it recorded in that state. In 1901 the sole heir of the partner executing such instrument, through an attorney in fact, sold and

conveyed an undivided half interest in the Texas lands, for a valuable consideration, to plaintiff's grantor; neither such purchaser nor plaintiff having any knowledge of any adverse title or claim. Rev. St. Tex. art. 4640, provides that an unrecorded conveyance shall be void as against a purchaser for value without notice. *Held*, that plaintiff acquired the legal title to the land, as well as the superior equity.

3. SAME—ACTION TO TRY TITLE—EVIDENCE.

In an action at law to determine the title to the land, the act of sale was not admissible as an evidence of title, since, at most, it conveyed merely an equitable right, and where there was, moreover, no satisfactory proof that the lands in question were ever the property of the partnership, or that they were obtained from debtors.

4. DEED—CONSTRUCTION—CONVEYANCE TO PARTNERS.

A deed of lands to two persons as individuals on its face conveys to each an undivided half interest, and no presumption arises that the lands are partnership property, even where it is shown that the grantees were partners in a mercantile business.

5. VENDOR AND PURCHASER—TITLE ACQUIRED—BONA FIDE PURCHASER.

Where plaintiff in an action at law to determine the title to lands pleads a legal title, and proves conveyances which on their face vest the title in him, and defendants set up a claim under a prior unrecorded conveyance from a common source of title, which, under the laws of the state, is void as against subsequent bona fide purchasers for value, without notice, evidence is admissible in rebuttal to show that plaintiff was such a purchaser; such evidence not tending to establish an equitable title, but being in support of plaintiff's legal title.

In Error to the Circuit Court of the United States for the Southern District of Texas.

L. B. Moody and G. H. Pendarvis, for plaintiff in error.

Kittrell & Kittrell and Hume & Hume, for defendants in error.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

SPEER, District Judge. This is an action for partition of lands. It was filed by the plaintiff, R. I. Lee, in the district court of Harris county, Tex., against the unknown heirs of John R. Marshall. Cited by publication, the defendants made appearance, whereupon the plaintiff amended his petition, and the case proceeded against them. Plaintiff is a citizen of Kansas, the defendants are citizens of New York, and the cause was duly removed to the Circuit Court of the United States for the Southern District of Texas, and entered upon the law docket. Simultaneously with the removal the defendants filed their original answer, which presented a general demurrer and a general denial of plaintiff's title. Thereafter the defendants also filed a special plea denying that the plaintiff had any title to or interest in the land sued for, and alleged that the defendants were the sole owners of all the lands, and prayed judgment to that effect. When the cause came on to be heard, a stipulation in writing was made by opposing counsel waiving a jury, and submitting the case, upon the law and facts, to the court.

It appeared from the evidence that the title to this land had originally vested in one A. M. Gentry. This he took as the assignee of certain patents to Jones, to Menifee, to Sanders, and to Jeffries. There is no

dispute as to the title of Gentry. He made four separate deeds to John R. Marshall and A. B. James, conveying to them, for various considerations, four different tracts of this land, "to have and to hold unto the said Marshall and James their heirs and assigns." The plaintiff and the defendants both claim title from John R. Marshall and A. B. James, or Marshall & James, and it follows that there is no dispute with regard to the antecedent title. When, however, we pass Marshall & James, the controversy appears. The plaintiff proved that Amadee De Gasquet James is the sole heir of A. B. James, of the late copartnership of Marshall & James, and that the defendants Martha M. Wysong, Louise M. Pollock, and Marie Marshall were the sole heirs and devisees of John R. Marshall, the other member of the copartnership of Marshall & James, and also sole heirs and devisees of his wife, namely, Eviline Marshall. It appears further from the evidence that on the 25th of August, 1897, Amadee De Gasquet James made a power of attorney authorizing one John McDougall, for James and in his name to ask, demand, sue for, and recover for him all lands in Texas to which he was entitled by inheritance, purchase, or otherwise. The same instrument authorized McDougall to make deeds of conveyance or other instruments, receiving and receipting for the consideration thereof, and also conveyed to McDougall an undivided half interest in and to all such lands. Acting under this power of attorney, McDougall, as attorney in fact for James, made a deed on August 19, 1901, conveying to J. H. McMorrow an undivided half interest in the lands described in the plaintiff's petition. This deed recited a consideration of \$4,320, and contained a clause of general warranty. It was recorded September 21, 1901, in the record of deeds of Harris county. McDougall, in his individual capacity, on August 25, 1901, made a quitclaim deed to J. H. McMorrow of all of his right, title, and interest to this land. This deed recited a consideration of \$10, and contained a clause of warranty against the grantor's heirs and all persons claiming under him. This was also recorded in Harris county on September 21st of the same year. McMorrow, now having in this way all the title which had previously vested in Amadee De Gasquet James, on the 24th of September, 1901, conveyed to R. I. Lee an undivided one-half interest in and to the land sued for. This was for a consideration of \$4,800. It contained a clause of general warranty, and was recorded in the same county on September 26, 1901. This R. I. Lee is the plaintiff, and he, having introduced this evidence, rested his case.

The defendants then put in the same deeds from Gentry to Marshall & James which had been previously introduced by the plaintiff. They then offered a copy of a notarial act of sale passed June 14, 1853, before Theodore Gyal, a notary public for the parish of Orleans, state of Louisiana. This instrument was duly exemplified in accordance with the statutes of the United States. From this it appears that A. B. James, for the consideration of \$205,000 paid to him by John R. Marshall, and said Marshall's assumption of and agreement to pay all of said James' liabilities as a member of three several firms of Marshall & James, therein described, and to hold him harmless and indemnified from and against all debts, obligations, and liabilities of whatsoever na-

ture and kind on account of said firms, grants, sells, conveys, transfers, and assigns—

"Unto John R. Marshall, present and accepting, and purchasing for himself, his heirs and assigns, all and singular the rights, title, interest, property, claim and demand of every kind and nature whatsoever of him, the said Andrew B. James, as a copartner in the two firms formerly existing and the one now existing in this city, and in the City of New York, under the name and style of Marshall & James, and composed of the said John R. Marshall and Andrew B. James, of, in and to, the property, effects and assets of the said firms, wheresoever situate and in whose possession and keeping soever the same may be, and consisting of the stock in trade, book debts, accounts, bills receivable, claims, real estate taken by the said firms from their debtors in settlement of their debts and situate in the States of Mississippi and Texas, and generally every other thing belonging to said firms and accruing to them in any manner or form, without any reservation whatsoever, and also any and all capital and balances this day standing to the credit of the said Andrew B. James on the books of the said several firms."

The act of sale recites the periods of the three firms, all styled Marshall & James, and composed of John R. Marshall and A. B. James. The first commenced July 1, 1845, and terminated July 1, 1848, and in this the partners held equal interests. The second commenced July 1, 1848, and terminated July 1, 1850, and in this James' interest was seven-sixteenths, and Marshall's was nine-sixteenths. The third commenced July 1, 1850, and was existing when the act of sale passed, June 14, 1853, and in this James' interest was $38\frac{3}{4}$ per cent., and Marshall's was $61\frac{1}{4}$ per cent. It appears that an exemplified copy of this act of sale had been filed for record in the office of the county clerk of Harris county on January 6, 1902, and recorded February 3d of the same year; but the defendants did not offer it for that reason, which, it was agreed, added nothing to its validity. To this copy act of sale the plaintiff objected because it was not admissible without proof of execution of the original; again, because it purported to dispose of the partnership assets of Marshall & James, and there was no evidence that the lands in dispute were a part of those assets; and for the further reason that it contained no description of the lands in controversy; also since, even if operative, it conveyed only an equitable title, and, in the absence of evidence that he had notice of such equitable title at the time he purchased the lands described in his petition, or in the absence of evidence that he did not pay a valuable consideration therefor, could not affect the rights of plaintiff, holding the legal title. The court overruled these objections, and admitted the exemplified copy in evidence, and to this the plaintiff excepted. The defendants then put in evidence a duly examined copy of said act of sale, made and proved by a witness who tested the accuracy of the copy of the original in the archives and records of the custodian of notarial records in New Orleans, and who testified that it was a true copy of the original. The contents of the examined copy are the same as those of the exemplified copy hereinbefore mentioned. The defendants then proved that the firm of Marshall & James paid taxes for the year 1853 on the lands sued for, and all back taxes which had accrued and remained unpaid from 1850 to 1853, and further that John R. Marshall, individually, as long as he lived, and after his death his estate, paid all taxes on

said lands from and including the year 1854 to the year 1901, and that in 1860 John R. Marshall redeemed one tract of said land, namely, the Sanders tract, from a sale made to the state for taxes due thereon for the year 1848, and also paid taxes due on said tract for the year 1849. The defendant introduced no other evidence. The plaintiff then called J. H. McMorrow and J. H. O'Donnell, and offered to prove by them that his vendor, J. H. McMorrow, had no notice at the time he purchased said lands of the existence of said act of sale of June 14, 1853, and that he was a subsequent purchaser for a valuable consideration. The defendants objected to this testimony for the reason that the plaintiff's action was at law, and that this evidence was cognizable only in equity, and again that the plaintiff had not pleaded, and therefore could not prove, that his vendor purchased said lands for a valuable consideration, and without notice of said act of sale. The court permitted the witnesses to be examined, reserving its ruling upon the objections. The defendants then offered testimony of certain other witnesses, which, however, does not appear material. The court took the cause under advisement, and finally sustained defendants' objections to the plaintiff's contention that his vendor was a subsequent purchaser for a valuable consideration, without notice of the unrecorded act of sale from A. B. James to J. R. Marshall, admitted the act of sale over plaintiff's objection, and thereupon made a final and general finding of the facts and the law for the defendants, to which ruling and finding the plaintiff excepted. Thereupon the court rendered judgment against the plaintiff, that he take nothing by this suit, and in favor of the defendants, that they go hence without day, and that the defendants have and recover costs, etc.

The proceeding for partition, by which it is attempted to try questions of title before the court, was treated by opposing counsel—all accomplished members of the Texas bar—as unquestionably appropriate under the law of Texas. We have the authority of Chancellor Kent for stating that the writ of partition, as enacted by St. 31 & 32 Henry VIII, has been gradually re-enacted and adopted, with probably enlarged facilities for partition, in the United States. Further, it does not appear that the question of possession entered into this controversy; otherwise a disseisin or adverse possession might, under the general rule, bar a suit for partition so long as the ouster continued. 4 Commentaries, p. 364, footnote. For a discussion of the subject, see *Bearden v. Benner* (C. C.) 120 Fed. 690. We assume, then, that it is competent to adjudicate the conflicting titles upon the proceeding before the court. The cause, when removed, proceeded without objection on the law side in the circuit court. The issues presented and passed upon were legal issues, the case submitted here presents only issues at law, and it follows that, on this writ of error, we are restricted to considerations depending upon the legal title. This, it appears, must be resolved in favor of the plaintiff in the court below, who is the plaintiff in error here. All the conveyances of the land described in the petition, from Gentry, who had succeeded by assignment to the title of the original patentees, placed the title, not in the partnership firm, Marshall & James, but in John R. Marshall and A. B. James. About this there can be no question. The deeds are explicit; the

descriptions of the land, definite and precise. It is equally unquestionable that Amadee De Gasquet James was the sole heir of A. B. James, and that the defendants Martha M. Wysong, Louise M. Pollock, and Marie Marshall are the sole heirs and devisees of John R. Marshall and of his wife, Eveline Marshall. There is also no question that an undivided half interest in these lands belonged to these successors in title of John R. Marshall. It is the disputed claim of the plaintiff, the successor in title of Amadee De Gasquet James, the sole heir of A. B. James, which must be determined. Now, Amadee De Gasquet James, it appears from the evidence, duly empowered one John McDougall to recover for him all lands in Texas to which he was entitled, and to convey the same; also, doubtless in consideration of these services of McDougall, an undivided half interest in the lands thus recovered was by the same instrument secured to him. McDougall, pursuant to the power of attorney thus granted, sold the undivided half interest of Amadee to J. H. McMorrow. It is claimed, and not disputed, that he was paid therefor the sum of \$4,320. McDougall also sold his own interest to McMorrow, and conveyed this, as it appears, by a quitclaim deed, only warranting title against his own grantor's heirs and all persons claiming under him. McMorrow, now having bought and paid for the title, conveyed it to Lee, the plaintiff. This party appears from the evidence to be a capitalist dwelling in Kansas, whose business is largely to deal in lands. The deed to Lee recited a consideration of \$4,800, and contained a clause of general warranty.

From this summary it appears that the plaintiff had purchased the legal title to the undivided half interest which formerly belonged to A. B. James. It follows that this title must prevail, unless it appears that, conformably to law, by legal and sufficient conveyance, it has been diverted to the defendants, or to some other person or persons. It is attempted to show this first by the contention that these lands were partnership property of Marshall & James. The evidence, however, is not at all clear or satisfactory to justify this conclusion. The conveyance from Gentry to J. R. Marshall and A. B. James, while made to them jointly, was not made to them as partners. It would probably have created a joint tenancy at common law. This, by the same law, even though such real estate might have been held by the joint tenants as partners, would have been subject to the right of survivorship. The right of survivorship among joint tenants has, however, been abolished in many states, except as to estates held in trust. In most of the United States the presumption is that all tenants who hold jointly hold as tenants in common, unless a clear intention to the contrary be shown. A tenancy in common is defined to be an estate held in joint possession by two or more persons at the same time, by several and distinct titles. 1 Washburn's Real Property, p. 415; 2 Blackstone, p. 191. There is in common tenancy a unity of possession, but no unity of title. It cannot, we think, be presumed that, because Marshall & James were members of the partnership of that name, a conveyance of real estate to John R. Marshall and A. B. James deposited the title among the partnership assets. There is, as before stated, no ambiguity about the deeds. The conveyance to the grantees was to them as individuals. It will, of course, be presumed that each took an undivided half interest. It is

clear that a deed from A. B. James conveying an undivided one-half interest in this land to a purchaser who had no knowledge of the title, save that conveyed by the deeds from Gentry, would have passed the title to such purchaser. While the right of Amadee De Gasquet James, the heir of A. B. James, would, perhaps, not be as incontestable as that of an innocent purchaser; yet, in the absence of any proof that this was partnership property, he would succeed at law to the distinct and separate title of his ancestor. It is, however, contended that A. B. James, by the act of sale, admitted in the Circuit Court, conveyed these lands to his partner. This we are clearly of the opinion is not maintainable. In the first place, there is no sufficient proof of the execution of that instrument as a conveyance of land in Texas. But if proof of execution was sufficient, how can it be said that the general designation, "all stock in trade, book debts, accounts, bills receivable, real estate taken by the said firms from their debtors in settlement of their debts and situated in the States of Mississippi and Texas and generally every other thing belonging to said firms or accruing to them in any manner or form without any reservation whatever," was a sufficient conveyance of the distinct title of A. B. James in the lands in dispute? As we have seen, there is no evidence that these lands were partnership property, except that the partnership paid taxes thereon. The only real estate conveyed by this act of sale was that "taken by the said firms from their debtors in settlement of their debts." However much we may surmise, this does not amount to a conveyance of distinct parcels of land standing in the name of A. B. James. Such a conveyance to the predecessor in title of one party is so indefinite that it cannot defeat the legal title in another. If, moreover, this act of sale is treated as effective to convey anything at all, it can be merely a right to establish by a suitable proceeding in equity an inchoate or equitable title. The plaintiff, however, in that view, would have an opposing equal, if not superior, equity. This act of sale was not recorded at the time of the plaintiff's purchase. It is clear that he had no knowledge of its existence, but paid a valuable consideration for the land, and bought in good faith. His is therefore the equity of a bona fide purchaser without notice. Conceding, arguendo, then, the existence of the inchoate and very indefinite equity of the heirs of Marshall, the equity of Lee cannot be disregarded. Where equities are equal, the law will prevail, and Lee has the legal title. But these equities are not equal. Lee has done all that the law required him to do. He took deeds clearly describing the land. He recorded them in time. He put the world on notice of his dealings with the land in dispute. The predecessors in title of the defendants were content to rely upon vague generalities in description, to leave in doubt whether the interest in dispute was partnership property or not, to execute an instrument not in itself sufficient at the time to convey title to land in Texas, and then to fail or refuse to record it. A court of equity, under the circumstances, would not, we think, hesitate to impose the loss which must fall on one or the other of these parties on those who are slothful, indifferent, or disregardful of the law, or who claim under those whose conduct was so lacking in that vigilance and attention to the rights of others which is exacted by courts of equity. But under the law of Texas, which

must control our action in this case, the right of the plaintiff is even stronger. An innocent purchaser from the heir takes the estate as against an unrecorded deed from the ancestor. *Holmes v. Johns*, 56 Tex. 41. The statutes of the state of Texas provide that an unrecorded conveyance shall be void as against a purchaser for value without notice. Rev. St. Tex. 1895, art. 4640; *De Guire v. St. Joseph Lead Company (C. C.)* 38 Fed. 65. It would seem, therefore, that the evidence offered to show that the plaintiff's vendor purchased the lands in controversy for a valuable consideration, without notice of the unrecorded conveyance from James to Marshall, was offered in support of the distinct legal right created by the policy of the state with reference to this question. The contention that the plaintiff should have specially pleaded, setting up his rights as a bona fide purchaser without notice of the unrecorded act of sale, seems to be equally unmaintainable. The proceeding for partition here is a statutory remedy. It possesses the requisites prescribed by the statute. Rev. St. Tex. 1895, art. 360. The proof of the plaintiff's equity as a bona fide purchaser, without notice of the unrecorded and insufficient act of sale, was not a part of his evidence in chief, of which the defendants were entitled to notice by suitable averments. It was in rebuttal and reply to the proof of defendants offered under the general denial.

For these reasons, we are of opinion that the Circuit Court was in error in admitting the act of sale, and in excluding the evidence of O'Donnell and McMorrow to show that the plaintiff had no notice of the existence of the act of sale at the time that he purchased the disputed interest, and that he was a purchaser in good faith for a valuable consideration, and in giving judgment for the defendants. Judgment of the court below is therefore reversed, and the cause will be remanded to the Circuit Court for its suitable action pursuant to this decision.

(129 Fed. 49.)

RADFORD v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 8, 1904.)

No. 55.

1. FEDERAL COURTS—APPEAL—RECORD—REDUCTION.

On an appeal to the Circuit Court of Appeals, where there is no question raised as to the credibility of any witness, or as to the weight of his testimony, and it is not important that the court should know just how the testimony was given, the testimony should not be printed in question and answer in the appeal record, but should be presented in narrative form.

2. CRIMINAL LAW—INDICTMENT—MOTION TO QUASH—EVIDENCE BEFORE GRAND JURY.

The denial of a motion to quash an indictment, on the ground that it was based on incompetent evidence of essential facts before the grand jury is a matter of discretion, and is not a proper subject of exception.

3. SAME—AFFIDAVITS.

The affidavit in support of a motion to quash an indictment on the ground that it was founded on incompetent testimony was to the effect that no other or different evidence than that given by deponent, which was objected to, was produced, or taken before the grand jury, pertaining to the question in issue, and that deponent was present "in and about the grand jury during the entire session thereof," was insufficient to show that no other testimony was introduced.

4. SAME—JURORS—ORDER OF CHALLENGE—OBJECTIONS—WAIVER.

Where, in a criminal prosecution in the federal courts, there was a dispute between counsel, while the jury was being impaneled, as to the order in which their respective peremptory challenges should be used, but neither counsel called the court's attention to it, and the United States attorney reserved one of his challenges until after talesmen had been drawn. It was not error to permit the government's attorney to exercise such challenge after defendant's challenges had been exhausted.

5. STATE STATUTES—APPLICATION.

Code Cr. Proc. N. Y. § 385, providing the order in which jurors drawn for the trial of criminal cases shall be challenged, is not binding on the federal courts sitting in that state for the trial of criminal cases.

6. SAME—CONSPIRACY—EVIDENCE—OBJECTIONS.

Where, in a prosecution for conspiracy, the court held that certain evidence introduced was admissible as against one of the conspirators only, and called the government attorney's attention explicitly to the fact that it was inadmissible as against the others, the admission of such evidence was not subject to exception on the part of the other defendants.

7. SAME.

In a prosecution for conspiracy to defraud the United States by the execution of straw bail, the introduction of affidavits of justification could not be objected to under Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], prohibiting the introduction of evidence obtained from a party or witness by means of a judicial proceeding, by any of the conspirators except those who made the affidavits.

8. SAME—ELEMENTS OF OFFENSE—LOSS.

In a prosecution for conspiracy to defraud the United States by the execution of straw bail, it was not necessary that the government should prove that the accused did not appear on the day required, since the government was defrauded when the accused were released on the strength of a recognizance, apparently good, but worthless in fact.

¶5. See Courts, vol. 13, Cent. Dig. § 908.

In Error to the District Court of the United States for the Western District of New York.

This cause comes here upon a writ of error to review a judgment of the District Court, Western District of New York, convicting plaintiff in error of a violation of section 5440, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3676], which reads as follows: "5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." The two indictments, which were duly consolidated by order of the court and tried together, charged four persons—Radford, Parrish, McLaren, and James—with entering into an unlawful agreement and combination and conspiring together to defraud the United States. The details of the conspiracy were as follows: Two Chinamen—Moy Dong Gin and Aye Yub—were under arrest charged with having unlawfully entered the United States, and were each held for trial before a United States commissioner. It was charged that the defendants agreed together that adjournments should be asked for and application made to admit to bail, and that upon the fixing of the bail Parrish and James should offer themselves as sureties. All four of them knew that the proposed sureties were not worth anything above just debts and liabilities, and therefore, in order to enable them ostensibly to justify by specifying and describing property as their own, it was agreed that Radford should convey to James and McLaren should convey to Parrish certain pieces of real estate specifically set forth in the indictment, which property was so conveyed for no other purpose than to be referred to in the sureties' justification. It was further charged that the properties so conveyed were not worth any sum above the amount of the incumbrances thereon, that this was well known to all of the accused, and that the whole scheme was one to defraud the United States by securing the release of the Chinamen upon recognizances apparently good, but in reality worthless, so that upon the failure of the Chinamen to appear for trial the government would be defrauded of the amount of the recognizances. The acts charged to have been done in furtherance of the conspiracy were the conveyance by Radford to James of three lots on St. Lawrence avenue, Buffalo, and three lots on Stone street, Tonawanda, and by McLaren to Parrish of a lot on Crowley avenue, Buffalo; also the giving of recognizances by James and Parrish, with affidavits of justification referring to the pieces of property so conveyed. The bail was accepted by the commissioners, and the Chinamen released. The latter failed to appear for trial, and the recognizances were duly estreated. The four accused persons were tried together. The jury found Radford and Parrish guilty, and acquitted McLaren and James.

C. A. Dolson, for plaintiff in error.

Chas. H. Brown, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Before entering upon a discussion of the points raised by assignment of errors and here argued, we must call attention to the character of the record presented to this court. It consists of 580 printed pages and a supplement of 96 pages in typewriting containing exhibits. The appeal is by Radford only, and there was no motion to direct acquittal as to him, or, indeed, as to any of the others. In view of the issues involved, the testimony is most voluminous, and it has been presented to us without the slightest effort to assist the court by concentrating its attention to the parts material to the assignments of error. Apparently it was thought that the only labor required of counsel was to fasten together the stenographer's min-

utes and the exhibits, and have them certified by the clerk of the District Court. In a note at the end of this opinion will be found a fair illustration of the result of such practice. Had this wearisome succession of question and answer been presented in narrative form, it is altogether probable that the record would have shrunk to a quarter, at least, of its present size, and this court have been spared the labor of winnowing wheat from chaff. Of course, there are many occasions when it is quite important to know just how the testimony was given, what hesitations there may have been on the part of a witness, what contradictions, how much of his answer was suggested by a question, so that there may be proper appreciation of the weight to be given to his testimony. But on this appeal there is no question raised as to the credibility of any witness or as to the weight of his testimony. Concededly, at the close of the case, all such questions were to be left to the jury, and they were so left. Counsel should appreciate that, although their first duty is to their client to see to it that everything material to that client's case, however trivial, is laid before the reviewing court, they also, as members of the bar practicing before that court, owe it a duty. We need not expatiate further on this point. It is thought—as it is hoped—that those who read the footnote and these criticisms will hereafter be more careful to discharge their full duty as counselors of this court.

Of the 25 errors assigned a few only have been presented in argument. These only need be discussed here. It is assigned as error that the court denied a motion to quash the indictments, which was based on the proposition that the grand jury acted upon incompetent evidence of the essential facts on which the charge was predicated, it appearing that a clerk in the office of the county clerk of Erie county (whose office is in Buffalo) attended before the grand jury in Lockport, and testified that upon a search of the records made by him he found certain deeds, mortgages, and judgments on file. It would be a sufficient answer to this assignment to call attention to the well-settled rule that such a motion is ordinarily addressed to the discretion of the trial court. The reason for entertaining motions to quash on grounds such as that above indicated is well set out in *U. S. v. Farrington* (D. C.) 5 Fed. 343:

"No person should be subjected to the expense, vexation, and contumely of a trial for a criminal offense unless the charge has been investigated, and a reasonable foundation laid for an indictment or information."

After conviction this reason no longer exists, because an intelligent and impartial jury of his peers, after a careful investigation, at which he has been represented by counsel, with full power to cross-examine, to introduce evidence, to tell his own story if he so choose, and to plead his cause, has reached the conclusion not only that there was a reasonable foundation for the charge, but that the charge was true. "The motion to quash was clearly determinable as a matter of discretion. It was preliminary in its character, and the denial of the motion could not finally decide any right of the defendant. The rule laid down by the elementary writers is that a motion to quash is directed to the sound discretion of the court,

and, if refused, is not a proper subject of exception." U. S. v. Rosenberg, 7 Wall. 580, 19 L. Ed. 263. But, if this were not so, the motion to quash would be held to be wholly without merit. By reason of the circumstance that the one affidavit on which it was made was among the typewritten exhibits, it did not come to our attention on the argument, and for the future guidance of counsel in other causes it should now be referred to. The clerk from the county clerk's office, after setting forth what he testified to as to the records he had found on file, avers that no record or document from that office was taken to the grand jury, and that none were exhibited to him when he gave his testimony. The remaining portion of his affidavit is as follows:

"That no other or different testimony or evidence [than his own] was produced or taken before said grand jury pertaining to the deeds, mortgages, or judgments appearing in the name of or against the said Ernest L. Parrish, as deponent verily believes; and the reason for his belief is that deponent was the only person from the said Erie county clerk's office before said grand jury; that deponent was present in and about the grand jury during the entire session of the said grand jury at the city of Lockport, as aforesaid; that deponent saw no books, records, or documents from said Erie county clerk's office before said grand jury at Lockport."

The expression, "present in the grand jury during the entire session," is of dubious meaning, but, if it stood alone, it might be construed as averring that he was in the grand jury room from the beginning to the end of every one of their meetings when this case was considered. But the affiant manifestly makes no such claim. He swears only that he "was present in and about the grand jury." How a person who is "about" a grand jury thereby becomes qualified to state everything which that body did and did not do is not apparent. How does he know that the grand jury did not have before them duly authenticated copies of every deed, mortgage, and judgment to which he testified? How does he know what other evidence they may have had of the transactions on which the charge was based? The belief of a person "present about a grand jury" is unimportant, and his assertion as to what took place in the grand jury room (except when he happened to be in it) is devoid of all weight. A motion to quash the indictments on such an affidavit as the one found among the exhibits was preposterous, and the effort to review the ruling of the trial judge thereon is frivolous.

Error is assigned in that the court permitted the United States attorney to excuse a particular jurymen against objection. The record is not quite clear as to what occurred. It appears that after examinations on the voir dire, and the exercise of all defendants' peremptory challenges, there were less than 12 men in the box, and the panel was exhausted. Talesmen were summoned and examined, the box was filled, and defendants' counsel announced that they were content with the jury. There is nothing to show that the government had made a like announcement. Thereupon the United States attorney proceeded to ask some questions of one of the jurymen. Whether or not he was one of those who entered the box after defendants had exhausted their challenges does not appear. Objection was made that the prosecuting officer was "bound to exhaust

his objections before the defendant takes up the objections." There seems to have been some dispute between counsel while the jury were being impaneled as to the order in which their respective peremptory challenges should be used, but neither of them called the court's attention to it. Upon hearing the objection above quoted, the court remarked that, if counsel had asked for a ruling, it would have made one; but that, not having done so, the challenge to the juror would be allowed. We see no error in this. Counsel apparently relies on section 385 of the New York Code of Criminal Procedure, which provides that "challenges to an individual juror must be taken first by the people and then by the defendant." Apparently this statute contemplates that when the box is filled with 12 men, who have successfully passed examination on the voir dire, they shall be taken up one by one in regular order, and as to each one so taken up the prosecutor first shall be required to state whether he challenges or not, and, if he do not challenge that juror, then the defendant shall be required to state whether or not he challenges him. If either challenge, and the vacant seat be filled by another juror, then the same order of propounding challenges to him should be observed; and the challenging should proceed in like order till the number of peremptory challenges allowed are exhausted, or both sides are on record as having specifically declined to challenge every one of the twelve in the box. This seems to be an excellent method of presenting the challenges, and would no doubt tend in practice to expedite the selection of a jury by cutting off some of the finessing with which that operation is so often obstructed. But, though it may quite appropriately be followed in the federal courts, the state statute does not lay down the rule for those tribunals in criminal trials (*Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429), and there is no error assignable if the trial judge fails to conform to state practice. As has been already indicated, there was no error in the disposition of the case at bar. Certainly upon no reasonable theory could either side have been compelled to exhaust its challenges until there were 12 men in the box to select from; and, if either side chose to exhaust its allowance without first making some request of the court as to regulating the order of challenge, it cannot complain if the other side has more prudently reserved one or more of its challenges to meet the selections from a new panel of talesmen, of whose names no one was advised until after the trial had begun, and as to whose antecedents, therefore, there has been no opportunity for inquiry.

It is next assigned as error that the court admitted in evidence "the deeds to the Virginia property." The defendant Parrish, in his affidavit of justification, stated that, in addition to the Crowley avenue property, he owned 542 acres of land in Virginia, free and clear of incumbrances. It was sought to be proved that this land had been conveyed to him by Radford, and that title had been divested by certain tax sales. Objection was made to the tax deeds because it was not shown that the preliminary steps to a tax sale had been taken. It will be unnecessary to examine any of these objections. The record shows that the government called a deputy

clerk of the Virginia court, and asked him some question about the title. Thereupon objection was taken, and the court ruled that the evidence would be received on the question of intent against Radford and Parrish. Before the question was answered, a further objection was raised that the witness was incompetent, and he was withdrawn, the United States attorney stating that he would show the state of affairs otherwise, and he offered a deed. Before the deed was received, defendants' counsel said: "If the court please, you announced this evidence would be received as to Radford. I think your honor should receive it as to Parrish only." To which the court replied, "Yes, I will recall that. Correct my ruling in that regard;" and thereupon three deeds covering the Virginia property were received, the court again stating, as the third was presented, that the evidence was received as tending to show that Parrish had no title in the property, and as to characterizing his intent and guilty knowledge. And as the last of the Virginia deeds—the fourth one—was marked in evidence the court said: "Of course, you understand, Mr. District Attorney, that this proof is offered solely as against Mr. Parrish, and not as against any of the other alleged conspirators," to which the District Attorney replied that he certainly so understood it. Under these circumstances the plaintiff in error Radford cannot complain of the admission of this evidence. If, when the case went to the jury, he had any apprehension that the jury might forget that the evidence was received only against Parrish, he should have asked to have them further instructed to disregard it as against himself. This he did not do.

Exception was reserved to the admission in evidence of the affidavits of justification—i. e., ownership of property—which defendants Parrish and James submitted with the recognizances they signed on the ground that such affidavits were "evidence obtained from a party or witness by means of a judicial proceeding," and as such within the provisions of section 860, Rev. St. U. S. [U. S. Comp. St. 1901, p. 661]. Such voluntary affidavits are apparently not within the section, but, if they were, the only persons who could invoke its provisions were those who had made the affidavits—Parrish and James. The plaintiff in error Radford could not properly object to their introduction against him.

The sole remaining assignment of error which has been argued is to a refusal to charge the following proposition:

"It is absolutely necessary to establish under this indictment that the defendants agreed that the Chinamen should not appear upon the adjourned day, because, if they did appear, no loss could occur upon the bond, and it would be an agreement, by the result of which the United States could not possibly have a loss. It must therefore be affirmatively proven as one of the essential elements of the crime charged that the defendants, and each of them, knew beforehand, and when they made the agreement, that these Chinese would not appear upon the adjourned day. A loss must occur, or at least there must be an agreement that could be effectuated."

The exception to the refusal so to charge was unsound. The United States were defrauded when the release of the Chinamen was obtained on the strength of a recognizance, apparently good, but in reality worthless. It was not necessary to go further, and

show that the defendants conspired to remove the Chinamen from the jurisdiction of the commissioner. The jury, from the proof, was entirely warranted in finding that it was the expectation of the conspirators that the persons who were left foot-loose when the bail bonds were accepted would avail themselves of the opportunity to decamp. The gist of the offense under section 5440 is the conspiracy to defraud, coupled with a single overt act. Whether or not the conspiracy is successful is wholly immaterial.

The judgment is affirmed.

NOTE.

Excerpts from Record.

Cross-examination of a witness for the prosecution, who had testified that he had bought a piece of property in Tonawanda, for the consideration of some watches given to the vendor: "Q. Was it more than one watch? A. I believe so, yes. Q. Are you sure? A. No. Q. Silver watch, was it? A. No. Q. Sure? A. Yes. Q. It must have been brass, then? A. No. Q. What? A. Not necessarily. Q. Copper one? A. No. Q. Do you know what the watch was worth? A. I couldn't tell you now. Q. Will you swear it was worth \$10? A. Yes. Q. \$12? A. Yes. Q. \$15. A. Yes. Q. \$20? A. Yes. Q. How much? A. I couldn't tell you the exact amount, as I said. Q. Could you tell me within \$10? A. I don't think so. Q. Could you tell me within \$20? A. Probably not. * * * Q. Have you ever acted as straw man for anybody? A. Never. Q. Isn't that part of your business? A. Part of my business? Q. Generally? A. Indeed, not. Q. Don't laugh at it. Just answer my question. A. Indeed not. Q. Do you know Samuel H. Cowles? A. I do not. Q. Did you ever see him? A. Not to my knowledge. Q. Do you know Harry Cowles? A. Harry Cowles? I do not. Q. Do you know Walter Cowles? A. I know W. C. Cowles. Q. Well, Walter C. Cowles, do you know him? A. Yes, sir. Q. Did you take the property as straw man for Walter? A. I did not. Q. As his agent? A. I did not. Q. Did you have any interest in the property—real interest? A. I did. Q. Ever have? A. I did. * * * Q. What is your business now? A. Gem expert. Q. What? A. Gem expert. Q. Working for any special firm, or generally on your own hook? A. Work for a firm in New York City. Q. What firm? A. J. Dreiser & Son. Q. What is the name? A. J. Dreiser & Son. Q. What is the address? A. 292 5th avenue. Q. How long have you been at work for them? A. 5 years and a half. Q. As gem expert? A. I have. Q. For that length of time? A. For that length of time. Q. Where do you live in New York? A. 31 W. 82d street. Q. Married man? A. Yes. Q. How long have you lived there? A. About a year. Q. Where did you live before that? A. 1254 Lexington avenue. Q. Keep house there? A. Yes. Q. How long did you live there? A. About 8 months. Q. Where did you live before that? A. 201 W. 106th street. Q. Did you keep house there? A. Yes, sir. Q. How long did you live there? A. A year. Q. Where did you live before that? A. I don't believe I can give you the number. Q. Well, give me the street. A. 25th street. Q. How long did you live there? A. I should say about a year. Q. Can you be any more definite than that? A. No. Q. Where did you live before that? A. Several different places where we boarded. Didn't keep house before that. Q. Well, you have been in New York only since '97. How many places have you boarded at since you have been there, before you commenced to keep house? A. Perhaps three. Q. Or more? A. I don't think so. Q. How long did you stay in each place? A. I couldn't tell you exactly; several months, perhaps. Q. And perhaps not? A. Longer in some; shorter in others. * * * Q. Did you ever pay any taxes on the property? A. Never did. Q. Did you ever receive any rents from anybody? A. Never did. Q. What? A. I never did. Q. That was in 1890? A. That was in 1890. Q. You remained here until 1897? A. 1897. Q. Never paid a dollar taxes? A. Never did. Q. Never paid a penny interest? A. Never did. Q. Never received a penny rent? A. Never did. Q. Never attempted to pay any part of the mortgage? A. Never did. Q. Never assumed

possession of the property? A. Except as it stood in my name. Q. Well, you never assumed possession? You never went there and took possession? A. I never went there and took possession, no. Q. No. You never had anybody there in possession for you, so far as you know? A. No. Q. You a man of wealth at that time? A. No. Q. Quite limited circumstances, were you not? A. Comparatively so."

In the examination of this witness alone there are many more pages of similar evidence without objection to a single question or motion to strike out a single answer. And the testimony of the other witnesses is presented in the same slovenly manner.

Excerpt No. 2.

The question to the witness, a searcher in the county clerk's office, asked if he found a certain deed on record. There is a whole printed page of elaborate objections, but at the end of the discussion the objections are overruled, and no exception taken, the witness answering in the negative. This is a sample of many other pages where multitudinous objections, which challenge attention and analysis, are needlessly presented, since no exception is reserved.

(129 Fed. 56.)

DUGAN v. BECKETT.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1904.)

No. 1,241.

1. CHATTEL MORTGAGES—VALIDITY—FRAUD—FEDERAL COURTS—STATE LAW—RULE OF DECISION.

In determining whether a chattel mortgage executed by a bankrupt was fraudulent on its face, the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property.

2. SAME—MORTGAGOR'S POSSESSION—EFFECT.

Where a chattel mortgage on a bankrupt's stock of goods authorized the mortgagor to continue in possession and sell the goods, but required that he should deposit to the mortgagee's bank account each day the receipts for sales over the amount of the running expenses of the store, to be applied on the debt, and that, if he failed so to do, the trustee named in the mortgage should at once take possession and sell the stock at public auction, such mortgage was not fraudulent on its face.

Appeal from the District Court of the United States for the Northern District of Mississippi.

On February 26, 1901, Joe A. Cohen executed and delivered the following mortgage:

"In consideration of the sum of one dollar, I convey and warrant to J. C. Baptist, as trustee, the following property now situated in the storehouse now occupied by J. A. Cohen in the City of West Point, Clay County, Mississippi, to-wit:

"All the stock of goods, wares and merchandise now in said storehouse, together with all showcases, counters, fixtures and iron safe. Also all goods, wares and merchandise to be hereafter acquired and placed in said storehouse, on all of which this incumbrance shall immediately attach, together with all notes, securities, accounts and bank [book] debts now made and due him in the course of his business or hereafter to be made or acquired by him in the course of said business.

¶ 1. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

¶ 2. See *Chattel Mortgages*, vol. 9, Cent. Dig. § 410.

"In trust, to secure R. C. Beckett a promissory note from me to him for the sum of twenty-three hundred and twenty-five (\$2,325.00) dollars, of this day and date, due and payable on the 1st day of November, 1901, bearing interest at the rate of 8% from date.

"Now the consideration of this deed of trust is that the said R. C. Beckett has paid on his indorsement for said J. A. Cohen and for advancements this day made to said J. A. Cohen to pay his debts, and for money also this day advanced to said J. A. Cohen, to enable him to make cash purchases in a replenishment of his said stock of goods now on hand, so as to enable him to sell the same to the best advantage. And the agreement being that the said J. A. Cohen is to deposit the net proceeds from said business, over and above running expenses thereof, each day, to the credit of R. C. Beckett in the Bank of West Point, Miss., until said indebtedness is fully paid off and satisfied, and it being further agreed that all the purchases hereafter made by the said J. A. Cohen are to be for cash from the said fund so advanced, and also, that in the event of any other purchases being made, or any other purchases being made on credit, that the seller shall first be notified, in writing, of the existence of this trust deed.

"Now, therefore, if the said J. A. Cohen shall faithfully comply with all the provisions of this trust, and pay said amount at or before maturity, then this trust is to be void.

"But if said J. A. Cohen shall violate any of the provisions of this deed, or shall not have the same fully paid off and discharged at the maturity thereof, together with all interest, then, in either event, the said trustee at the request of said R. C. Beckett or his assigns or legal representatives, shall immediately take charge of all of said property mentioned and included in this trust deed, and in the true intent and meaning thereof, and shall proceed to sell the same at public outcry to the highest bidder for cash, in front of the Courthouse door of said county, after giving ten days' notice of the time, place and terms of sale by written or printed notices put up in at least three public places in said county, and out of the proceeds shall first pay all the costs and charges incident to the execution of this trust; and shall then pay whatever balance is due to said R. C. Beckett, until the same is fully paid off and satisfied, and the balance shall be paid to said J. A. Cohen or whoever may at the time be legally entitled thereto.

"The said J. C. Baptist accepts the provisions of this trust. If the said J. C. Baptist should die, or remove from the state, county or town, or should become unable or unwilling or fail or refuse to execute this trust, then said R. C. Beckett, or his assigns or legal representatives, may appoint another trustee, who shall have and exercise the same powers and duties, and this power to appoint a substituted trustee shall exist as often and so long as any vacancy from any of the above causes shall occur or exist.

"Witness our signatures this Feby. 26, 1901.

"I accept this trust.

"[Signed]

Joe A. Cohen.

J. C. Baptist, Trustee.

"R. C. Beckett."

The mortgage was duly acknowledged by the parties to it on the day of its date, and was duly filed and recorded in the proper office on the same day. On a petition filed in the lower court December 2, 1901, Joe A. Cohen was adjudicated an involuntary bankrupt, and Henry Dugan was appointed his trustee in bankruptcy. Cohen having made default in the payment of the mortgage to secure the debt to Beckett, F. G. Barry, who had been substituted as trustee in the mortgage, took possession of the mortgaged goods. Barry, as such trustee under the mortgage, sold the goods under an agreement between all the parties in interest that he would deposit the proceeds of the sale in bank, and that they should be turned over, without deduction, to the trustee in bankruptcy, subject to the rights of R. C. Beckett and others. On January 29, 1902, R. C. Beckett filed his petition in the bankruptcy court claiming under the mortgage the proceeds of the sale of the goods. On February 24, 1902, Henry Dugan, trustee in bankruptcy, answered Beckett's petition, alleging that the mortgage was void as to creditors because Cohen was allowed to remain in possession of the merchandise and to continue to sell the same. Beckett's petition was referred to the referee, and on a hearing before him he found

and reported to the court that the mortgage was not void on its face, and that it was not invalid as matter of fact. And he thereupon ordered that the proceeds of the sale of the goods to the amount of \$2,177.85, with interest thereon, be paid to R. C. Beckett by the trustee in bankruptcy out of money in his hands derived from the sale of the property described in the mortgage. The referee's report was confirmed by decree of the district court, and thereupon Henry Dugan, trustee in bankruptcy, appealed to this court, and assigns that the court below erred in the decree rendered.

T. W. Brame (Ivy & Ivy and Brame & Barnes, on the brief), for appellant.

R. C. Beckett, pro se.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appellant's contention is that the mortgage to secure the debt to Beckett is void under the common law and the statutes of Mississippi. If that is true, although it was executed more than four months before the adjudication in bankruptcy, it could not be enforced as a valid lien on the bankrupt's estate against the creditors of the bankrupt. The appellant contends (1) that the mortgage is void for actual fraud, and (2) that it is void on its face. There is nothing in the record to sustain the first contention. The evidence shows without conflict that Beckett only sought to secure the payment of a just debt. If it be conceded that Cohen's conduct was fraudulent after the execution of the mortgage, there is no proof whatever that Beckett, or the trustee named in the mortgage, was connected with it, or even had any knowledge of it. Such fraudulent conduct on the part of the grantor, if it be proved, would not affect the rights of Beckett under the mortgage. *Baldwin v. Little*, 64 Miss. 126, 8 South. 168; *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. Ed. 49. The question to be decided is whether, as matter of law, the mortgage on its face is valid or invalid. More than 20 years ago a learned writer on mortgages said that whether a mortgage of the stock of goods of a trader, which permits the mortgagor to sell the mortgaged property in the usual course of trade, is necessarily fraudulent, is one of the disputed questions of our jurisprudence. *Jones, Chat. Mort.* 379. The same conflict of authority on the question continues, the courts of last resort in the several states differing greatly in their conclusions. 6 Cyc. 1104. In deciding the question the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property. Such a mortgage was by the Supreme Court held void in Indiana (*Robinson v. Elliott*, 22 Wall. 513, 22 L. Ed. 758), but it would "not be held, as a matter of law, to be absolutely void or fraudulent as to other creditors" in Michigan (*People's Savings Bank v. Bates*, 120 U. S. 556, 561, 7 Sup. Ct. 679, 30 L. Ed. 754); and such a mortgage is valid in Iowa (*Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171). In the latter case, after deciding the question as one of local law, the court observed that: "If this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they

are made in good faith." There are well-considered authorities that sustain the position that it is not fraud per se for the mortgagor of chattels to retain a power of sale, and that the retention of such power is only a circumstance to be considered by the court or jury, as the case may be, in determining the question of fraud in fact. *Jones on Chat. Mortgages* (3d Ed.) 379; 6 Cyc. 1104. The mortgage before the court, the validity of which is in question, is not simply a mortgage on a stock of goods which permits the mortgagor in the usual course of trade to sell the mortgaged property, but it contains other provisions which must be considered in connection with this retained power of sale. It permits Cohen, the mortgagor, to retain possession of the merchandise and to continue his business, and as to the disposition of the money, the proceeds of sales, it is provided: "And the agreement being that the said J. A. Cohen is to deposit the net proceeds from said business, over and above running expenses thereof, each day, to the credit of R. C. Beckett in the Bank of West Point, Miss., until said indebtedness, is fully paid off and satisfied." It is provided, also, that if the mortgagor "shall violate any of the provisions of this deed" the trustee, at the request of the beneficiary, shall immediately take charge of the property and foreclose the mortgage. In *Robinson v. Elliott*, supra, in which, following the local law, a mortgage was held void, the mortgagor having retained the power of sale in the usual course of business, the court was careful to say:

"We are not prepared to say that a mortgage under the Indiana statute would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors."

And in *Etheridge v. Sperry*, supra, Mr. Justice Brewer, speaking for the Supreme Court, said:

"In neither of those cases [referring to *Means v. Dowd*, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429, and *Robinson v. Elliott*, supra] is it affirmed that a chattel mortgage on a stock of goods is necessarily invalidated by the fact that either in the mortgage or by parol agreement between the parties the mortgagor is to retain possession, with the right to sell the goods at retail. On the contrary, it is clearly recognized in them that such an instrument is valid, notwithstanding these stipulations, if it appears that the sales were to be for the benefit of the mortgagee."

Under the rule indicated by these cases, the mortgage in question here clearly should not be held invalid on its face, unless we are required to do so by the laws of Mississippi. By statute in Mississippi every conveyance of goods or chattels, by writing or otherwise, contrived of fraud or collusion with the intent or purpose to hinder, delay, or defraud creditors, is void as against creditors of the grantor. Rev. Code 1892, § 4226. But such conveyance is not void as to subsequent creditors unless made with the intent to defraud them. Id. § 4228. In *Harmann v. Hoskins*, 56 Miss. 142, the court held that a mortgage given by a merchant on his stock of goods, which authorized him to remain in possession and continue business under the direction of a named trustee, was upon its face fraudulent and void. An examination of the case shows that it is not out of harmony with the cases that we have already

cited. The mortgage evidently on its face showed that it did not serve as a genuine security. The mortgagor was left in possession of the stock of goods, with the power to sell the same, and to make purchases to replenish his stock in the usual course of business. It did not provide that a dollar of the money for which he sold the goods should be applied to the payment of the debt apparently secured by the mortgage. The court, in declaring the mortgage void on its face, laid stress on the fact that "nothing is said about cash sales or money thus derived." In *Joseph v. Levi*, 58 Miss. 843, 846, the court held that a like mortgage was void on its face as to creditors, although it provided for monthly accounts to be rendered to the trustee, and for payment to him of the money received, to be applied, however, to payment of the current expenses of the business and in making purchases to replenish the stock. It will be noted that it made no provision for the application of the proceeds of the sale of the goods in payment of the debt secured. The court said:

"As the money was not to be applied to the discharge of the debt secured by the terms of the deed of trust, and was to be kept in the business, the instrument is not distinguished from those which have been held to be incurably vicious and void."

In each of these cases it seems clearly implied that, if provision had been made in the mortgage for an application of the proceeds of the sale of the goods to the payment of the debts secured, they would not have been held void on their face. The fact that the mortgage permits the mortgagor to hold the property and deal with it does not make the mortgage void. The rule, as announced in *Mississippi*, is that "it is only where the conveyance so unmistakably reserves the right to the mortgagor to deal with the property mortgaged as his own that all evidence to the contrary should be excluded as contradicting the writing that a court can declare the deed fraudulent in law." *Britton v. Criswell*, 63 Miss. 394, 401. The provision in the mortgage in question here requiring the proceeds of the sale of the goods to be applied to the payment of the debt secured by the mortgage makes it unlike the mortgages which the Supreme Court of Mississippi holds to be necessarily invalid. The court is of the opinion that the mortgage, on its face, is not invalid.

The decree of the District Court is affirmed.

(129 Fed. 60.)

ALEXIS v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,134.

1. LARCENY FROM THE MAILS—INDICTMENT—STAMPED PACKAGE.

In a prosecution under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], for larceny from the mails, an indictment charging that the stolen package had been placed in the mail, and came into defendant's possession in his capacity as a mail clerk, was sufficient to authorize the admission of evidence that the package had been stamped, and the manner of such stamping.

2. SAME—NAMES OF PERSONS—IDEM SONANS.

Where an indictment charged defendant with extracting from the mails, embezzling, and stealing the contents of a package addressed to "L. Krowder," evidence that the package was addressed to "L. Krower" did not constitute a variance, such names being idem sonans.

3. SAME—TRIAL—REOPENING CASE.

Where there was nothing in defendant's affidavit accompanying his application to have the case reopened, and to be permitted to introduce further evidence after the testimony had been closed, either as to the nature of the evidence sought to be added, as to the witnesses by whom it was expected to be given, or the reason why it had not been offered sooner, to require the granting of the application, it was not an abuse of the court's discretion to deny the same.

4. SAME—REQUESTS TO CHARGE.

Where, in so far as requests to charge were correct, they were given by the court, either in modifications thereto or in the general charge, and each of them contained matter that was either erroneous, or not pertinent to the proof, the requests were properly denied.

5. SAME—INSTRUCTIONS—WITNESSES—CREDIBILITY OF ACCUSED.

Where the court charged that defendant had a perfect right to testify, and, having done so, his testimony should be treated like that of any other witness, and that it was for the jury to find whether or not he had told the truth, it was not error to add that, in considering defendant's testimony, which, if true, entitled him to an acquittal, the jury should consider the very grave interest which he had at stake in the case.

6. SAME—REASONABLE DOUBT.

Where the court properly charged the law relating to reasonable doubt, and declared that defendant was presumed to be innocent, and that such presumption obtained until the government convinced the jury beyond a reasonable doubt that he was guilty, it was not error to add that, if a doubt arose which was an unreasonable doubt, the jury should pay no attention thereto.

7. SAME—OMITTED INSTRUCTIONS.

The omission of the court to give instructions that were not requested by defendant was not ground for reversal.

8. SAME—NEW TRIAL—PRESENCE OF DEFENDANT.

A defendant in a criminal case has no right to be personally present at the hearing of a motion in his behalf for a new trial, and his absence at such hearing will not invalidate a sentence subsequently passed on him.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

W. W. Howe, U. S. Atty.

W. O. Hart, for defendant.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The indictment in this case contains two counts, each based on the last paragraph of section 5467 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3691], which is substantially as follows:

"Any such person (that is, any such post office employé) who shall steal any of the things aforesaid (that is, the contents out of any letter, packet, bag or mail of letters) which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor," etc.

¶ 8. See Criminal Law, vol. 15, Cent. Dig. § 2412.

The charging part of each of these counts was, substantially, that on the 16th day of February, 1900, at the city of New Orleans, the defendant, being then and there employed in a department of the postal service of the United States, to wit, as a clerk in the post office at the city of New Orleans, did unlawfully, willfully, and feloniously steal, take, and carry away (certain articles named), all being the property of one F. M. Hamilton, and the (articles named) were then and there stolen and taken as aforesaid by the said George D. Alexis from and out of a certain package then lately "put into the mail" of the United States at the post office in said city of New Orleans, and which then and there had come into his possession in his capacity as such clerk, as aforesaid, and by virtue of his said office and employment; and the said package was directed in the tenor following, that is to say, "John W. Francis, care of W. R. Irby & Co., New Orleans, La.," and had not been delivered to the party to whom the same was directed, contrary to the form of the statute, etc. In the second count the articles named were different, the ownership laid the same, and the count in other respects the same, except that it alleges that the said package was directed in the tenor following; that is to say, "Leonard Krowder, New Orleans, La." There was a general verdict of guilty on both counts, and the accused was sentenced to imprisonment at hard labor for a term of one year and one day. This sentence does not exceed the punishment that might have been imposed on either one of the counts of this indictment.

The first, third, and fifth errors assigned relate to the admission of evidence in reference to the fact of the package having been stamped, the manner in which it was stamped, and the absence of an allegation in the count as to its having been stamped at all. These assignments are not well taken, because it was not necessary to allege that the package was stamped. Neither the language of the provision of the statute under which the indictments were found nor the reason of the statute requires any such allegation. The indictment having charged that the package then lately put into the mail had come into his possession in his capacity as such clerk was sufficient averment on that point to admit the evidence over defendant's objection taken when the evidence was offered. *United States v. Hall* (D. C.) 76 Fed. 568.

The second assignment is not well taken. It is in these words:

"Because the court erred in allowing L. S. Woods, a witness on behalf of the United States, to testify on December 20, 1901, regarding the contents of the package said to have been addressed to L. Krower, when the indictments charge defendant with abstracting, embezzling, and stealing the contents of a package addressed to L. Krowder."

The tenth assignment presents the same question.

"A name need not be correctly spelled in an indictment, if substantially the same sound is preserved. The following are cases in which the variance between the names as alleged and as proven was at least as great as in the present, and in which it was held that the variance was not material: *Bubb and Bopp* [*Myer v. Fegaly*], 39 Pa. 429 [80 Am. Dec. 534]; *Heckman and Hackman* [*Bergmann's Appeal*], 88 Pa. 120; *Hutson and Hudson* [*Cato v. Hutson*], 7 Mo. 147; *Shaffer and Shafer* [*Rowe v. Palmer*], 29 Kan. 337; *Woolley and Wolley*

[*Power v. Woolley*], 21 Ark. 462; *Penryn and Pennyryne* [*Elliott v. Knott*], 14 Md. 121 [74 Am. Dec. 519].” *Faust v. United States*, 163 U. S. 452, 16 Sup. Ct. 1112, 41 L. Ed. 224.

The fourth assignment of error is directed to the action of the court in not reopening the case for further evidence after the testimony had been closed. There was nothing in the affidavit accompanying the application either as to the nature of the evidence sought to be added to what had already been received, or as to the witnesses by whom it was expected to be given, or as to reason why they had not been offered sooner, to require the reopening of the taking of proof. The motion was addressed to the discretion of the trial judge, and his discretion was properly exercised.

The sixth, seventh, and ninth assignments of error are based on the refusal of the judge to give certain requested charges. So far as these requests were correct, they were given by the judge, either in certain modifications thereof that he made and gave, or in his general charge, and for this reason, and also because each of them contained matter that was either not sound or not pertinent to the proof, they were rightly refused.

The eighth error assigned is substantially embraced in the seventh.

The eleventh error assigned is because the court erred in the general charge in giving this part thereof to the jury, to wit:

“Therefore I say to you, in considering the testimony of the defendant, which, if true, entitles him to acquittal, you are to consider the very grave interest that he has at stake in this case.”

This is only the closing line of the judge’s charge on this subject. This is the context:

“When a defendant in a case of this kind takes the stand (which he has a perfect right to do), he is subjected to all the obligations of a witness, and his testimony is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the matter of his testimony, and the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember—you have a perfect right to do so, and it is your duty to do so—the very grave interest the defendant has in this case. Now, that does not mean, and you must not understand me to say that it means, that whenever a man is accused of a crime, and takes the stand in behalf of himself, he will naturally commit perjury; but, of course, as he places himself as a witness, he stands like any other witness. But his interest, or bias, or anything else that may affect his testimony, is a matter which, of course, the jury is bound to take into consideration. Therefore I say to you, in considering the testimony of the defendant, which, if true, entitles him to an acquittal, you are to consider the very grave interest which he has at stake in this case.”

This charge is not erroneous. *Reagan v. United States*, 157 U. S. 301–311, 15 Sup. Ct. 610, 39 L. Ed. 709.

The twelfth error assigned is:

“Because the court erred in the general charge by giving this part thereof to the jury, to wit: ‘Of course, if a doubt arising in your mind is an unreasonable doubt, you should pay no attention to that doubt.’”

The judge had, in the language used by the defendant’s counsel in one of his requests, given the jury the following:

“The case of the United States against the defendant must be made out completely to your satisfaction, and beyond all reasonable doubt.”

Afterwards, in the general charge, he instructed the jury thus:

"In a case of this kind you cannot find the defendant guilty, unless you are satisfied of his guilt beyond a reasonable doubt. You must remember that in a criminal case the amount of proof that is required on the part of the government is different from the amount of proof that is required of the successful party in a civil suit. In a civil suit the verdict goes in favor of the party who has the preponderance of proof. That means the party who has more proof than the other side. But in a criminal case you start out with the presumption that the man brought to the bar of the court is an innocent man, and the jury sit in their seats, and await the time. If it ever comes, when the government convinces them beyond a reasonable doubt that the man is guilty. Whenever that condition of things is produced in your minds, then it is your bounden duty to find the defendant guilty, regardless of what the consequences may be; and if you are satisfied beyond a reasonable doubt that the defendant is guilty, then you have no right to withhold that verdict simply because of some question of sentiment on your part, or some question of mercy, or some question of prejudice. * * * While I have said to you that you must be convinced beyond a reasonable doubt, do not make the mistake to believe that you must be satisfied beyond all possible doubt, because that is not the law, and it would not be reasonable, either, that you must be satisfied beyond every possible doubt. There is nothing certain except in the domain of mathematics. I do not know what could be proven beyond all possible doubt. All that you are called upon to do is to determine whether or not this defendant has been proven to you to be guilty in such a way that there is no reasonable doubt arising in your minds. Of course, if the doubt arising in your minds is an unreasonable doubt, you should pay no attention to that doubt. But if, as reasonable men, considering a matter of grave importance, you should come to the conclusion that a certain amount of proof establishes that conclusion in such a manner that you have no reasonable doubt about it, then that is the condition of mind in which you must be before you find this man guilty; but you are not required to go beyond that and be convinced beyond every possible doubt."

The thirteenth assignment of error is:

"Because the court erred in not specially charging the jury as to their duties under each count of the indictment, and that they might acquit as to one and convict as to the other."

It is no ground for reversal that the court omitted to give instructions that were not requested by the defendant. *Isaacs v. United States*, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229.

The fourteenth assignment of error presents an action of the trial judge which is not reviewable in this court.

The fifteenth assignment of error—that the court erred in overruling the motion in arrest of judgment—is disposed of by the action we have taken on the previous assignments. The grounds of that motion were the same as the suggestions of error we have already considered.

The sixteenth and last error assigned is:

"The court erred in hearing and deciding the application made for a new trial when defendant was not present in court."

"A defendant in a criminal case has no right to be personally present at a hearing of a motion in his behalf for a new trial, and his absence will not invalidate a sentence subsequently passed upon him." This is the syllabus to the case of *Commonwealth v. John S. Castello*, 121 Mass. 371, 23 Am. Rep. 277. Judge Gray, who delivered the opinion in that case, uses this language:

"The rule that the defendant has a right to be present at every step of the proceedings against him in behalf of the commonwealth, from arraignment

to sentence, does not apply to a motion for new trial, which is not a necessary step in those proceedings, and is not made by the commonwealth, but by the defendant himself, and is addressed to the discretion of the court, and is not followed by any new judgment against him."

Montgomery v. United States, 162 U. S. 410, 16 Sup. Ct. 797, 40 L. Ed. 1020; Coffin v. United States, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; Sparf and Hansen v. United States, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343—are referred to in support of the general views advanced in the foregoing opinion.

Having noticed the numerous grounds of error assigned, we find them all without merit, and the judgment is therefore affirmed.

(129 Fed. 65.)

AMERICAN S. S. CO. v. AMERICAN STEEL BARGE CO. et al

(Circuit Court of Appeals, Sixth Circuit. April 2, 1904.)

No. 1,251.

1. COLLISION—CONTRIBUTORY FAULT—BURDEN AND MEASURE OF PROOF.

Where the fault of one vessel is palpable and adequate to account for a collision, she cannot impugn the management of another vessel, except on clear proof of contributory fault.

2. SAME—STEAMER PASSING BETWEEN MEETING TOWS.

The Crescent City, a large lake steamer, laden with iron ore, when coming down the St. Clair river, at night, overtook and attempted to pass the steamer Trevor, with two barges in tow tandem, each on a line 750 feet long, just as they were passing round the Southeast Bend. At the same time the Maricopa, with the large barge Manila in tow, both in water ballast, was passing up. The meeting vessels were within sight of each other's lights when the Crescent City started to pass the overtaken tow, and soon thereafter passing signals were exchanged, and in pursuance thereof the descending steamer and tow kept toward the western side of the channel, while the Maricopa and tow were as close as possible to the eastern bank. As the Maricopa was rounding the bend she was passed by the Crescent City, which then took a straight course, making toward the Canadian or eastern shore, and kept it without checking her speed of about 12 miles by the land until she collided with the Manila, then sheered off, and struck the towline behind the Trevor, throwing her across the channel, where she was struck by the first tow before she could get out of the way. There was a distance of about 200 feet between the ascending and descending tows. The Trevor was going at a speed of 9½ miles by the land, and the Maricopa of 8 miles. There was a wind from the southeast, which tended to drift the Manila toward the center of the channel. *Held*, that the Crescent City was clearly in fault, both because of her excessive speed while trying to pass between the two tows at such a place, and for the course she took after passing the Maricopa, directed toward the course of the Manila; that neither of the other vessels was in fault, the speed of the Maricopa apparently being necessary to prevent the Manila from drifting, and it appearing that the latter was following her steamer, and did all that was possible to avoid the collision.

Cross-Appeals from the District Court of the United States for the Eastern District of Michigan.

Goulder, Holding & Masten, for appellant.

Hermion A. Kelley (Hoyt, Dustin & Kelley, of counsel), for appellee American Steel Barge Co.

John C. Shaw (Charles B. Warren, William B. Cady, and Herbert K. Oakes, of counsel), for appellee Minnesota S. S. Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The series of collisions out of which this case arose took place on the St. Clair river between 8 and 9 o'clock the night of August 9, 1899. The night was dark, but clear. A wind was blowing across the channel from about S. S. E., probably strong enough to drift a slow-going tow. Six vessels were involved. The whaleback steamer John B. Trevor, with the barges 131 and 118 in tow, all loaded with ore, was bound down, followed by the steamer Crescent City, also loaded with ore, while the steamer Maricopa, with the barge Manila in tow, both in water ballast, was bound up. The Trevor was 308 feet long, the "131" was 292 feet, and the "118" was 285 feet. The tow lines were each about 750 feet long. The Trevor and her barges each drew about 18 feet, and were making about $7\frac{1}{2}$ miles an hour through the water. The Crescent City was 426 feet long, drew about 18 feet, and was making about 10 miles through the water, or 12 miles by the land. The Maricopa was about 428 feet long, and the Manila about 450 feet long; the towline between being about 800 feet long. The Maricopa drew about 15 feet aft and 1 or 2 feet forward, the Manila drew about 7 feet aft and 6 feet forward, and their speed was about 10 miles an hour through the water, or about 8 by the land. The scene of the collisions was what is known as the "South-east Bend," beginning about $2\frac{1}{4}$ miles above the upper end of the St. Clair Flats Ship Canal. The river here winds through the low marshland known as the "St. Clair Flats." There is nothing on the Canadian side to obstruct the view. So a vessel entering the upper end of the bend commands the entire bend and river to the ship canal. The navigable channel varies in width, being about 900 feet at the points of collision, but less above, and is very crooked; a descending vessel turning from a course about northwest to a course almost southwest, while an ascending vessel swings from a course about northeast to a course nearly southeast. When the Crescent City reached the bend, coming down, she was fast overtaking the Trevor and her tow. The Maricopa and Manila were then approaching or entering the bend, coming up, and their lights were in plain view over the flats on the Canadian side. The Crescent City gave a two-blast signal, which was answered, and proceeded, without checking her speed, to pass the Trevor tow to port. While the Crescent City was thus overtaking and passing the Trevor tow in the bend, the Trevor, and later the Crescent City, exchanged one-blast signals with the Maricopa, thus agreeing to pass port to port, which required the Crescent City to direct her course between the Trevor tow and the Maricopa tow. The Crescent City met and passed the Maricopa safely. The distance between the Maricopa and the Trevor tow at that time was at least 200 feet, and between the Crescent City and the Maricopa between 50 and 75 feet. The Maricopa was on a curved course, gradually swinging, under a port wheel, around the bend. The Manila was following her. About this time the Crescent City adopted a southwesterly course, bear-

ing towards the Canadian shore, which is described by her captain. This course was straight, and she kept it without checking her speed until she collided with the Manila; the port bow of the Crescent City coming in contact with the port quarter of the Manila. The distance between the Manila and the Trevor at this time was about 200 feet. From this collision the Crescent City sheered sharply to starboard, and brought up in the bight of the towline between the Trevor and the "131," barely missing the stern of the Trevor. The Trevor was thrown broadside the channel, heading for the Canadian shore. She backed, and, as the towline dropped below the stem of the Crescent City, cut it. The Crescent City then went ahead and under a starboard helm, straightened up, and passed on down. The Trevor immediately started her engines, but, before she could get out of the way, the "131," coming down at a speed of about 6 miles, struck her on the port side aft, staving a large hole, and making it necessary to beach her on the Canadian bank. The court below condemned the Crescent City, the Maricopa, and the Manila—the first two because of their speed, and the last because of her position; taking the view that the stern of the Manila was wrongfully in the course of the Crescent City, but that, if the Crescent City and the Maricopa had checked down after signaling to pass, there would have been time, after discovering the danger ahead, to avoid the collision. The Trevor and her barges were held blameless. From the decree based on this finding, the parties have appealed.

1. The negligence of the Crescent City was palpable and persistent. It began with her speed, was aggravated by her course, and rendered inexcusable by her persistence in both, despite a threatened collision. When she reached the upper end of the bend, she had a clear view of the canal. She could see not only the Trevor tow in the bend ahead, going down, but the Maricopa tow below it, coming up. She should have considered the danger of trying to pass these tows in that crooked channel without checking her speed. But she wanted to pass the Trevor tow before it should reach the canal, so as not to be delayed there, and for this reason kept her speed, and hurried headlong between the descending and ascending tows. As was said in *The Syracuse*, 9 Wall. 672, 676, 19 L. Ed. 783: "She had no right thus to hurl herself like a projectile into the midst of the vessels before her, taking the hazard of the consequences." So much the learned judge below found, and we concur in this conclusion.

2. But the fault did not end with the speed, for the Crescent City, before she was out of the bend or had passed the Maricopa, adopted a straight course, which converged toward the Canadian side, up which the Maricopa and Manila were then working on a curved course. The Crescent City had not yet passed the "131." The straight course taken constituted a short cut across what remained of the bend, inevitably carrying the Crescent City close to the course of the Maricopa tow. Such a course, under the circumstances, was inexcusable, yet it is clear it was taken. The captain of the Crescent City says that when they met the Maricopa his boat was going steady on a straight course. "There is a little curve there, but we were going straight then." This course was not changed until he struck the Manila. He

marked this course upon the map, and the point of collision was where the line approached the Canadian side. The second mate stated they were working toward the Canadian shore while passing the Maricopa. The captain of the "131" said the Crescent City was heading a point or a point and a half further toward the Canadian bank than he was. The captain of the Maricopa testified that, when the Crescent City passed him, she appeared to be heading not quite a point on to the Canadian side. The second mate stated that, when the Crescent City passed the Maricopa, she was drawing in all the time on their course. All this makes it plain that the Crescent City took a course which carried her over toward the Canadian shore. At this time there was a space, variously estimated at between 200 and 300 feet, left for her between the descending and ascending tows. All the vessels were in the bend. The Trevor and her tow were on the American side of the range, near the middle of the channel. The Maricopa, with the Manila 800 feet behind, was gradually swinging around the bend, hugging the Canadian bank. She was without cargo, and so was her tow. The Manila was a very large barge—450 feet long—and was drawing only 6 feet forward and 7 feet aft. She exposed a broad surface to the wind, and the wind was blowing across the channel from the Canadian side. Under these circumstances, in order to prevent the Manila drifting to leeward, it may have been advisable not only to tow her at a good speed, but to some extent to hold her in to the wind. Such being the situation, it was the plain duty of the Crescent City to divide the space between the two tows and follow a winding course, keeping her distance from the ascending tow until she had cleared it. Instead of doing this, in reckless disregard of the existing conditions, the Crescent City laid her course a point or a point and a half more toward the Canadian side than the course of either the descending or ascending tows, and, with strange persistence, held it until she struck the Manila.

3. The captain of the Crescent City admitted that when abreast the stern of the Maricopa he discerned the Manila, and realized she was across his course. At that time a distance of some 1,200 feet separated the Crescent City and the aft quarter of the Manila. The captain was asked whether he tried to change his course or check his speed, and answered that he did not. He was asked, "Why not?" and gave three different excuses: First, that he did not have time; second, that he did not think it was necessary; and, third, that he did not have room. None of these excuses are satisfactory. In our opinion, there was time and opportunity both to check and to port. If this had been done, we cannot but believe the Crescent City would have cleared the Manila. Twenty feet to starboard would have taken her by. There was ample space between the Manila and the Trevor to have made this maneuver. The captain stated there was at least 200 feet. Why nothing was done, we can hardly conjecture.

4. We come now to consider the conduct of the Manila and the Maricopa. The lower court condemned both—the former on account of her position, the latter on account of her speed. For the reasons we have given, the fault of the Crescent City is palpable. Both her speed and her course were reckless and inexcusable. The doctrine of

The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84, followed by this court in *The Australia*, 120 Fed. 220, 224, 56 C. C. A. 568, is therefore applicable. The fault of the Crescent City being adequate to account for the collision, she may not impugn the management of either the Manila or the Maricopa without clear proof of contributing faults on their part. As was said by the Supreme Court in the case of *The Victory*, 168 U. S. 410, 423, 18 Sup. Ct. 149, 155, 42 L. Ed. 519, quoted by this court in the case of the steamer *Philip Minch*, 128 Fed. 578:

"As between these vessels, the fault of the Victor being obvious and inexcusable, the evidence to establish fault on the part of the Plymouthian must be clear and convincing in order to make a case for apportionment."

Now, the charge against the Manila (sustained by the lower court) is that she got into the path of the Crescent City by failing to follow her steamer, and that against the Maricopa is that she towed the Manila too fast to permit her to get out of the way of the Crescent City. But if the Crescent City had no right to take the course she did, then the Manila did not get into her path. It was not the path of the Crescent City, but that of the Manila, which was infringed. If the Crescent City had divided the space between the two tows, she would not have been against the Manila when the Manila was 200 feet from the Trevor. The Crescent City made no complaint of the course of the Maricopa, and the proof fails to show that the Manila was not following the Maricopa as closely as prudent navigation permitted. In rounding the bend with the wind off the Canadian shore, she may have tailed some—it may have been advisable to hold her up some. But this should have been foreseen and allowed for by the Crescent City. The apparent swing of the Manila's stern into the stream was doubtless the result partly of her proper navigation in rounding the bend with a wind abeam, and partly of the wrongful course of the Crescent City. If the Crescent City had been pursuing a course midway between the two tows, and parallel with theirs, the stern of the Manila would not have seemed to swing out into the stream. It is conceded that, when the Crescent City was discovered bearing down upon the Manila, every precaution was taken on the latter. Her helm was gradually ported until hard aport, and, when the Crescent City reached her bow, was put hard astarboard. As to the speed of the Maricopa: This steamer was proceeding at about 10 miles an hour through the water, or 8 by the land. The signal of the Crescent City compelled her to take the Canadian side, from which the wind was blowing. It was necessary not only to keep close to that side, but to keep her tow there; that is, to keep going at a speed which would prevent the tow from drifting. Her master testified that he considered it imprudent to check down, for fear the Manila would sag to leeward. Under the rule, the proof must satisfy us that the master of the Maricopa was clearly wrong in not checking down. It does not. Both as to the Manila and the Maricopa, the evidence fails to meet the rule which we have quoted. In neither case is it so clear and convincing as to establish the fault charged. We are not satisfied that the Manila was where she had no right to be, nor are we convinced that the Maricopa was towing the Manila at too great a speed.

5. The second collision—that between the Trevor and the “131”—can be disposed of in a few words. The Crescent City, being at fault in the collision with the Manila, must be held responsible for the collision with the towline between the Trevor and the “131.” The sole question is whether the Trevor or the “131” neglected to do anything that could have been done to avert or avoid the collision which took place when the Crescent City got out from between them and passed on down. We are not satisfied that anything effective could have been done. The vessels were then in extremis. There was no time for either the Trevor to acquire headway, or the “131” to respond to a port helm. They were so close together and the time so limited that the accident was inevitable.

The decree of the court below is reversed, and the case remanded, with directions to assess the damages and costs against the Crescent City.

(129 Fed. 70.)

NATIONAL SURETY CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1904.)

No. 1,936.

1. BOND OF LETTER CARRIER—LIABILITY OF SURETY—COLLECTING LETTERS TO BE REGISTERED.

The bond of a letter carrier and of his surety for the faithful discharge of the duties and trusts imposed upon the former as a letter carrier, “either by the postal laws of the United States or the rules and regulations of the Post-Office Department of the United States,” binds the surety for the faithful discharge by his principal of the duty of collecting letters and packages to be registered which was imposed upon the letter carrier by an order of the Post-Office Department during the term of the bond.

2. SAME—CONSTRUCTION—ACCORDING TO LAWS AND REGULATIONS.

The parties to a bond for the faithful discharge of the duties of an office according to laws and regulations, which the obligee has the right and power to change at any time, necessarily contemplate and intend to guaranty thereby the discharge of the duties of the office imposed upon the principal by the subsequent legislation or regulation of the obligee during the term of the bond, which are within the scope of the office, and are germane to, and naturally connected with, its duties when the bond is made. They do not warrant or intend to guaranty the discharge of duties beyond the scope of the office, disconnected with its business or foreign to its duties at the time of the execution of the bond.

3. SAME—DUTY OF COLLECTING LETTERS TO BE REGISTERED GERMANE TO FORMER DUTIES.

The duty of collecting letters and packages to be registered imposed upon letter carriers by the order of the Postmaster General of December 5, 1890, is within the scope of the office of a letter carrier, and germane to previous duties pertaining to it.

4. SAME—UNITED STATES MAY RECOVER OF SURETY FOR THEFT BY PRINCIPAL—BAILEE FOR HIRE.

The United States may maintain an action against the surety on the bond of a letter carrier who has stolen letters to be registered for the value

¶ 1. Liabilities of sureties for acts of officers under color of office, see note to *Chandler v. Rutherford*, 43 C. C. A. 222.

¶ 4. See Bailment, vol. 6, Cent. Dig. §§ 98–100, 136.

of the contents of the stolen letters, where the contents of no single letter exceeded \$10 in value, although the owners of the letters have made no claim against the government for indemnity, and nothing has been paid to them.

A bailee for hire of services may maintain an action of trespass, trover, or conversion for the disturbance of his possession by a wrongdoer, and may recover the value of the property as damages.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Nebraska.

Ralph W. Breckenridge (Charles J. Greene and James C. Kinsler, on the brief), for plaintiff in error.

W. S. Summers and S. R. Rush, for the United States.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. On April 1, 1899, 79 letter carriers at the city of Omaha in the state of Nebraska, as principals, and the National Surety Company, as their surety, gave a bond to the United States in the sum of \$79,000, conditioned that if each of the principals "shall faithfully perform all the duties and trusts imposed upon him as such letter carrier either by the postal laws of the United States or the rules and regulations of the post-office department of the United States and shall faithfully account for and pay over to the postmaster at Omaha, Nebr., all moneys which shall come into his hands as such letter carrier, and shall, upon the termination of his office, return to the proper officer all property of every kind and description which shall be in his possession as such letter carrier," then the obligation should be void, but otherwise of force. At the time this bond was executed these letter carriers were forbidden to collect or receive letters or packages to be registered, but it was a part of their duties to deliver registered mail, and to collect and deliver other letters and packages. Postal Laws & Regulations 1893, § 1049. In December, 1899, the Postmaster General made an order to the effect that letter carriers in the residential districts of certain cities, one of which was Omaha, should collect certain letters to be registered. Order No. 762. Dec. 5, 1899; Postal Laws and Regulations 1902, § 805. Under this order, John Eich, one of the principals in the bond, collected three letters to be registered, which contained, respectively, \$6, \$3.50, and \$1.50, and rifled them of their contents. The United States has made no restitution of any of this money to either of the senders or addressees of the letters. It has, however, brought this action against the surety company to recover the \$11 which the letters contained, and a judgment for that amount has been entered in its favor, pursuant to a peremptory instruction to the jury that the plaintiff was entitled to their verdict.

The peremptory instruction of the court, and the judgment which followed it, are challenged in this court upon two grounds: (1) That the imposition of the duty of collecting letters and packages to be registered, upon the principal, Eich, after the bond in suit was given,

added to the duties of the office of the letter carrier a new duty and a new responsibility, for which the surety was not liable upon its bond; and (2) that the United States is entitled to no recovery in any event, because it has neither incurred any liability, nor suffered any loss, by the theft of the money by the principal in the bond.

The agreement of a surety must be strictly construed. His responsibility may not be extended by implication beyond the terms of his bond. An additional liability, which his contract does not clearly show to have been within the reasonable contemplation and intention of the parties to it when it was made, cannot be imposed upon him by the subsequent action of the obligee or of the principal in the bond. *Miller v. Stewart*, 9 Wheat. 680, 701, 6 L. Ed. 189; *U. S. v. Singer*, 82 U. S. 111, 122, 21 L. Ed. 49.

But the contract of a surety, like all other contracts, must have a reasonable construction—an interpretation, which, while it carefully restricts his responsibility to that which he agreed to undertake, does not fail to hold him to that liability which, by the plain terms of the agreement, he contracted to assume. The surety in the case in hand agreed with the United States to be liable for the faithful discharge by its principal, Eich, of all the duties and trusts imposed upon him as a letter carrier either by the postal laws of the United States, or by the rules and regulations of the Post-Office Department of the nation. When this bond was executed the United States had the right and power, by act of Congress, and the Postmaster General had the right, by rule or order, to increase, diminish, or modify the duties of the principal in this bond, as a letter carrier, at any time they saw fit; and all the parties to this contract were aware of this fact. The proposition has become too well settled to admit of discussion that an obligation of a surety for the faithful discharge of the duties of an office according to the laws and regulations which prescribe those duties, made to one who has the right and power to change such laws and regulations at any time, is, in its true interpretation and meaning, a contract for the faithful discharge of the duties of the office according to the laws and regulations, not only as they are at the time when the bond is made, but also as they shall subsequently become during the term of the bond, provided only that subsequent legislation or regulation adds no new duty or responsibility which is not germane to the duties or within the scope of the office at the time of the making of the bond. All duties prescribed by subsequent legislation or regulation which are of the same kind as those previously pertaining to the office, which are within its scope and which naturally belong to its business, are within the reasonable contemplation and evident intention of the parties to such a contract, because they know the necessity and probability of changes in the duties of the office, and the bond binds principal and surety alike for their faithful discharge. *U. S. v. Singer*, 82 U. S. 111, 122, 21 L. Ed. 49; *U. S. v. Powell*, 81 U. S. 493, 500, 20 L. Ed. 726; *U. S. v. Gaussen*, 25 Fed. Cas. 1267, 1269, No. 15,192; *Postmaster General v. Munger*, 19 Fed. Cas. 1099, 1103, No. 11,309; *Boody v. U. S.*, 3 Fed. Cas. 860, 864, No. 1,636; *White v. Fox*, 22 Me. 341, 347; *U. S. v. McCartney (C. C.)* 1 Fed. 104, 106, 111; *Chadwick v. U. S. (C. C.)* 3 Fed. 750, 755; *King v. Nichols*, 16 Ohio St.

82; U. S. v. Cheeseman, 25 Fed. Cas. 414, No. 14,790; Murfree on Official Bonds, §§ 711, 712, 713.

When this bond was executed the collection and distribution of letters and packages which were not registered, and which might nevertheless contain money or other articles of value, and the distribution of registered letters and packages, were some of the duties of the principal as a letter carrier. The collection of letters and packages to be registered was a duty of the same kind as the duty of the distribution of registered letters and packages. It was a duty within the scope of and naturally connected with the business of the office. Hence the liability of the surety for its discharge falls within the true interpretation of its obligation to answer for the faithful discharge of the duties of its principal according to the laws and regulations which prescribe them.

The second objection to the judgment is that the United States has neither incurred any liability nor suffered any loss by the theft of the contents of the letters, and hence it cannot maintain an action for damages on account of it. In support of this contention, attention is called to the fact that section 3926 of the Revised Statutes [U. S. Comp. St. 1901, p. 2685] provides that the Postmaster General shall make rules under which the owners of first-class registered matter shall be indemnified by the United States for losses thereof through the mails, to amounts not exceeding \$10 for any one registered piece; that such rules have been prescribed; that these rules require that claims for indemnity shall be made within one year from the dates of the losses (Postal Laws & Regulations 1902, § 900); that there is no averment or proof that any claim for indemnity for the loss of any of the moneys here in question has ever been made; and that the government admits that it has never paid anything to any one on account of it. The right of the nation, however, to a recovery in this action, is not necessarily limited by the acts or omissions of the owners of the stolen money since the theft. It depends upon the facts and circumstances when the money was stolen. When this was done, the money was in the custody—the possession—of the United States under its contract with those who had intrusted the letters to its care to safely carry and deliver them to their addressees for the valuable consideration which it had received by virtue of the stamps upon the letters which had been purchased from it. The contract between the United States and the owners of the letters was a bailment of the class known as "*locatio operis mercium vehendarum*." It was a carrier—a bailee of the letters and their contents for hire of labor or services. From this carrier or bailee Eich took and converted the letters and their contents to his own use. But a bailee may maintain an action of trespass, of trover, or of conversion against a wrongdoer for his disturbance of his possession of the property. The *Beaconsfield*, 158 U. S. 303, 307, 15 Sup. Ct. 860, 39 L. Ed. 993; The *New York* (D. C.) 93 Fed. 495, 499; *Shaw v. Kaler*, 106 Mass. 448; *Eaton v. Lynde*, 15 Mass. 242; *Burdick v. Murray*, 3 Vt. 302, 21 Am. Dec. 588. The United States, therefore, was not without sufficient interest in the subject-matter to enable it to recover of Eich, the letter carrier, the entire value of the property he took, as its damages for the conversion of the money. But Eich converted the

letters and their contents when he was in the act of performing his duty of collecting and delivering them to the postmaster at Omaha, and when he and the surety company were under an agreement with the plaintiff that they would pay all damages, not exceeding \$1,000, which resulted to it from Eich's failure to discharge his duties faithfully, and to account and pay over to the postmaster all moneys which should come into his hands as a letter carrier. Since the government was entitled to recover the value of the letters as its damages for their conversion, this value was also the measure of the damages it sustained under the bond, and a cause of action against the obligors in the bond to recover these damages arose as soon as the theft of the letters was completed. As soon as the conversion was effected, the United States had a complete right of action against the obligors upon the bond for the value of the property taken by the principal, and each of the respective owners of the letters had an indefeasible claim against the government for the value of the contents of his letter. The right of action of the United States, however, was not conditioned, created, released, or affected by the fact that the owners of the letters presented or failed to present their claims for indemnity to the government, and this fact constituted no defense to this action.

The judgment below must accordingly be affirmed, and it is so ordered.

(129 Fed. 74.)

JOHNSTON v. FAIRMONT MILLS et al

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

No. 478.

1. SALES—CONTRACT MADE THROUGH BROKER—REQUIREMENT OF CONFIRMATION BY PRINCIPAL.

Where there was an established custom in the cotton trade for both buyer and seller to confirm to each other in writing a sale made by a broker, an offer by a broker to sell cotton for future delivery to a cotton mill, accepted by the mill company "subject to confirmation" by the seller named in the offer, did not create a contract, and the acceptance was subject to withdrawal at any time before such confirmation.

2. SAME—ACCEPTANCE OF OFFER.

A proposal to accept an offer for the purchase of cotton on terms varying materially from those offered is a rejection of the offer, and does not create a contract binding the purchaser.

3. SAME—WAIVER OF CONFIRMATION.

Where an offer by a broker to sell cotton for future delivery was accepted subject to confirmation by his principal, as customary in the trade, and before confirmation the seller became insolvent, a demand for security by the intending purchaser was not a waiver of the requirement of confirmation.

In Error to the Circuit Court of the United States for the District of South Carolina.

For opinion below, see 116 Fed. 537.

This is a writ of error to a judgment of the Circuit Court of the United States for the District of South Carolina rendered on the 4th day of August,

¶ 2. See Sales, vol. 43, Cent. Dig. § 47.

1902, dismissing at the cost of the plaintiff a certain action at law instituted in said court against the defendants. The facts may be briefly stated as follows: The appellant instituted this action for the recovery against the Fairmont Mills, a corporation of the state of South Carolina, and L. Guy Harris, as receiver of said corporation, damages for the breach of two alleged contracts entered into between the said Fairmont Mills and himself on or about the 10th and 15th days of October, 1900, under which the plaintiff contracted to sell and deliver to the Fairmont Mills 500 bales of cotton, 100 of said bales to be delivered during each of the months of February, March, April, May, and June, 1901, to be paid for as follows: For the cotton delivered in February, March, and April, 1901, 10½ cents per pound; for the remainder, 10¼ cents per pound. That after the making of said contracts cotton declined rapidly, and on or about October 28, 1900, the Fairmont Mills notified the plaintiff that it canceled the contracts, and would not accept, receive, or pay for the cotton. That the plaintiff was always ready to carry out the contract on his part, and was prevented from so doing by the action of the defendant. That, owing to the decline in the price of cotton, plaintiff was prevented from placing the cotton at the price agreed upon, and, as a consequence, was damaged in the sum of \$4,687.50. The defendants deny the existence of the contracts, and, while conceding that there were negotiations through one C. P. Mathews, a cotton broker, looking to such contracts, they insist that the broker did not submit to the two parties the same terms, and never reached an agreement as to the terms, and the contracts were never consummated. Defendants further assert that, while negotiations were pending, plaintiff became insolvent, whereupon they warned him, unless he furnished a proper guaranty that he could perform the contract on his part, if completed, by noon of the 27th of October, 1900, they would not conclude the same; that the plaintiff failed to do this, and the defendant mills notified him that the deal was off, and sought cotton elsewhere.

A jury trial being waived, pursuant to the act of Congress, the case was submitted to the judge of the court below, who, after stating the facts to be:

"The transaction occurred through the agency of C. P. Mathews. Mr. Mathews is a cotton broker residing in Spartanburg, South Carolina, doing business in the Carolinas, chiefly with cotton mills. On 10th October, 1900, Mr. Harris, president of the Fairmont Mills, made an offer to him, as such broker, to buy cotton, 100 bales for each of the months of February, March, and April, at 10½ cents. He communicated the offer by telegram to the plaintiff, at Meridian, Mississippi, and received by telegram, the same day, authority to accept the offer of 300 bales at 10½, shipments named. He communicated by telephone to Mr. Harris the receipt of this authority, and on the next day (11th October) wrote Mr. Harris as follows:

"I beg to confirm sale to you of 300 B-C to you at 10½ landed Moore's So. Ca., for a/c of A. S. Johnston, Meridian, Mississippi. The cotton to be half each, st. and good mid., to be shipped 100 B-C each in February, March and April; wts. guaranteed within three pounds. Please confirm sale and oblige,

"Yours truly,

C. P. Mathews."

"It does not appear, except by this letter, that Mr. Harris knew who would furnish the cotton. On receipt of this letter, Mr. Harris replies:

"I have your letter of this date [11th October] confirming sale to us of 300 B-C, landed at Moore's, So. Ca. The cotton to be half each st. and good mid., and 100 bales delivered each month of February, March and April next, wts. guaranteed within three pounds, and hereby accept offer of same subject to A. S. Johnston's confirmation.

"Yours truly,

W. I. Harris, Pres."

"On the 15th October, 1900, Mr. Harris made another offer to C. P. Mathews for the purchase of 200 bales of cotton at 10½, deliverable 100 bales each in months of May and June, 1901. This was communicated also to A. S. Johnston, at Meridian, Miss., by wire, and Johnston, by wire, answered, 'Confirm sale 100 bales, each May and June, st. mid. to good mid., 10½.' On its receipt, Mathews notified Harris, and on the next day he wrote a letter identical in terms, except as to number of bales and the price, with his former letter. To this Harris replies, using the same terms as his reply to the former letter, varying only as to the number of bales and the price, and ending, as in his

former letter, 'sold to us by A. S. Johnston, Meridian, Miss., and subject to his confirmation.' The usage of the mills is always to require confirmation by the principal of contracts made through the broker, and this confirmation is made to the purchaser direct—sent either by mail or through the broker. In the present instance, Mathews requested Johnston to confirm direct to Harris. After the 15th, and between that day and the 25th, of October, unpleasant rumors were in circulation as to the solvency of Johnston. Whereupon Mr. Harris on 25th October, demanded from Mathews security for the performance of these contracts by Johnston. Mathews wired this demand to Johnston, who replied, referring to C. W. Robinson and John Kenyon. Mathews telegraphed to these gentlemen to confirm this, but got no reply. On 27th October, Mathews not furnishing the security demanded, Harris canceled the contracts. On the 29th October, 1900, Mathews inclosed to Harris letter of Johnston confirming the contract of 10th October, except that the place of delivery was stated to be Spartanburg, S. C., instead of Moore's, as stated by Mathews. On or about 1st November, 1900, Johnston went to Spartanburg, and, in company with Mr. Bozeman, his attorney, and Mr. Caine, of Mississippi, offered Mr. Caine as his surety for delivery of the cotton as per contracts. Mr. Harris made no objection to the character and sufficiency of the security, but refused to accept it, as the contracts were canceled. Mr. Mathews says that in this transaction he acted merely as agent of each party in making the sale, and assumed no responsibility."

—Announced his findings thereon, and conclusions of law, as follows:

"Findings of Fact.

"(1) The plaintiff is a citizen and resident of the state of Mississippi, and the defendant corporation, the Fairmont Mills, and L. Guy Harris, receiver, are citizens and residents of the state of South Carolina.

"(2) C. P. Mathews is a cotton broker at Spartanburg, South Carolina, doing business in the Carolinas.

"(3) On 10th October, 1900, negotiations were entered into between W. J. Harris, president of Fairmont Mills, and C. P. Mathews, for the purchase of three hundred bales of cotton, strict to good middling, at 10½ cents per pound, deliverable 100 bales each in the months of February, March and April, 1901, at Moore's, S. C. And on 15th October, 1900, other negotiations were entered into between the same parties for the purchase of 200 bales of cotton at 10¼ cents per pound, deliverable 100 bales each in the months of May and June, 1901, at Moore's, S. C.

"(4) These negotiations culminated in a written offer on the part of Mathews, acting for A. S. Johnston, the plaintiff, for the delivery of the above-mentioned bales of cotton at the prices and terms and place specified, one-half of each delivery to be good, and one-half strict middling, with the terms added; weights guaranteed not to lose more than three pounds per bale.

"(5) Pending these negotiations, telegrams had been passed between Mathews and Johnston, in which the outlines of the proposition were stated. The offer of Mathews gave the offer in detail, and for the first time.

"(6) The detailed offer of Mathews was accepted by Harris, subject to confirmation by Johnston. This is the usage of the trade in Spartanburg by the mills in purchasing cotton for future delivery.

"(7) The confirmation by Johnston not having been received, on 27th October, 1900, Mr. Harris, president of Fairmont Mills, canceled the transaction.

"Conclusions of Law.

"The contract between plaintiff and defendant, never having been completed, was not binding, and the verdict must be for the defendant."

C. P. Sanders and S. J. Simpson, for plaintiff in error.

William M. Jones (Nicholls & Jones, on the brief), for defendants in error.

Before GOFF, Circuit Judge, and WADDILL and McDOWELL, District Judges.

WADDILL, District Judge (after stating the facts as above). There are a number of assignments of error in this case, but they all relate, in one form or another, to three questions involved: First, whether or not valid contracts were ever entered into between the parties, as set up in the pleadings; second, whether or not, under the circumstances of this case, the defendant the Fairmont Mills was justified in imposing upon the plaintiff the requirement of a guaranty of his ability to carry out the alleged contracts, his insolvency being admitted; and, third, what was the effect of this requirement, as bearing upon the question of the existence of the prior contracts?

This case turns upon the question of fact as to whether the alleged contracts were in fact entered into between the plaintiff and the defendant the Fairmont Mills. Upon that point the learned judge of the lower court decided that they had not, and, after a most careful review of the entire evidence, with the light of the arguments of able counsel thereon, we have reached the same conclusion.

That the minds of parties must meet, and give mutual assent to all of the essential and material features of a contract, is elementary. It cannot be said that such was the case here. The transaction was conducted between the parties through C. P. Mathews, a broker, and he clearly did not have the right, under the facts of this case, to bind either party without their assent: and certainly he had no such authority to speak for the defendant the Fairmont Mills. The evidence conclusively shows that the custom in the trade was for both buyer and seller to each confirm to the other the broker's action in writing. This is testified to by the broker himself, who says:

"When Mr. Harris submitted the offer, I submitted the offer to Mr. Johnston. I had no authority until I got authority from Mr. Johnston to confirm the contract. * * * It was always customary for the mill to confirm to the buyer, and the buyer to the mill. I was acting only as intermediary, and each side wanted the contracts confirmed. * * * There was probably something in the offer that Mr. Johnston would confirm the sale by letter. It was understood that Mr. Harris was to receive written confirmation from Mr. Johnston."

While sundry letters and telegrams passed between Mathews and Johnston, and some between Mathews and Harris, the president of the mill, still it is entirely clear from the whole correspondence that Harris was to receive written confirmation of the sale from Johnston. Mathews' reply to the telegram from Johnston to him confirming the sales of February, March, and April, concludes, "Please confirm contract to W. I. Harris, president, Spartanburg, South Carolina," and Harris' letter of the 11th of October acknowledging the receipt of the letter from Mathews, relative to confirming the sale concludes, "Weights guaranteed within three pounds, and hereby accept offer of same subject to A. S. Johnston's confirmation." The subsequent letters written by Johnston direct to Harris, president, but received after the cancellation of the contract by Harris, likewise show that Johnston was to have given a written confirmation. In addition to this, the correspondence between Mathews and Johnston also shows that this confirmation was to have been given, and on the day before the cancellation of the contract, October 26, 1900, Mathews wrote:

"If you had only confirmed these sales promptly, there would have been no trouble. A lawyer told one of the mills that the only ground he had for getting

out, would be that you had failed to confirm the sale. Even now I have never been able to get the sales properly confirmed by you. I returned the confirmations to you on the 17th for correction; since then I have not had a line from you."

And on the 27th of October, the day on which the notice was given that the contracts would be canceled if no guaranty was given, Mathews wrote Johnston:

"I will say, however, that all the sales have been confirmed to me regularly, and only awaited your confirmation to the mills for them to confirm. I do not consider you have treated me fairly in the matter."

Johnston thus clearly failed to confirm, in writing, the contracts to Harris. But this is not the only particular wherein the transaction was not consummated. Their minds never met upon other material and essential portions of the undertaking. They agree as to the quantity of the cotton and the price, but in other essentials entirely differ. Harris understood that the cotton was to be delivered at Moore's, S. C. Johnston's confirmation, in so far as it designates a place at all, is at Spartanburg; and it is not entirely clear that he obligated himself to do more than ship the cotton from the place of sale, Meridian, Miss., within the time named. Harris prescribed that the cotton was to be half each strict and good middling, and emphasized in his second letter by stipulating for strict to good middling cotton, one-half each grade. Johnston agreed only that the cotton should be strict good middling, and not one-half each grade. Harris required the delivery of 100 bales each for the months of February, March, April, May, and June; weights to be guaranteed within three pounds. Johnston gave no undertaking as to weight, and, as above stated, had in view manifestly shipments, rather than deliveries—at least, his telegrams and letters are liable to this interpretation—which might have resulted disastrously to Harris, but showed clearly that in this, as in other particulars, there was an utter failure of the minds of the parties to meet on these essential features of the undertaking. To bind Harris on his offers, it was necessary that the same should be accepted in the identical terms in which they were made; otherwise his offers imposed no obligation upon him; and a proposal to accept, or an acceptance on terms varying from those offered, is a rejection of the offer.

In *Minneapolis Ry. Co. v. Columbus Rolling Mills*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376, it is said:

"As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party. The one may decline to accept, or the other may withdraw his offer, and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."

In 1 Chitty on Contracts (11 Am. Ed.) it is said at page 15:

"Where an agreement is sought to be established by means of letters, such letters will not constitute an agreement, unless the answer be a simple acceptance of the proposal, without the introduction of any new term. And

again: "If the original offer leave anything to be settled by future arrangement, it is merely a proposal to enter into an agreement. * * * The agreement is not complete until there is upon the face of the correspondence a clear accession on both sides to one and the same set of terms."

In 1 Parson on Contracts (6th Ed.) p. 476, it is said:

"The assent must comprehend the whole of the proposition, it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter."

Applying these principles to the facts in this case, it is manifest that no valid contracts were entered into between the parties, unless it be that Harris' requirement of a guaranty on or before the 27th of October should be treated as a confirmation of the incomplete contracts theretofore existing. This action of Harris clearly should have no such effect, since it is apparent from the entire evidence that he was acting in good faith in what he did. He made the offers as early as the 10th and 15th of October, which were never accepted, and pending this condition of affairs it developed that Johnston had failed in business—his insolvency being admitted, as of the 20th day of October, 1900; and he had the right to withdraw the offer, or otherwise terminate the transaction, which he did not do in undue haste, but insisted that a proper guarantee of the ability of Johnston to perform the contracts on his part should be given him, designating a day beyond which he would not wait. Johnston promised to give this guaranty, and endeavored to do so; but, as is apparent from the correspondence between himself and Mathews, he was unable to furnish the guaranty, and Harris, on the day indicated, declared the transaction at an end. Several days after this date, Johnston was enabled to furnish the guaranty; but Harris then declined to reopen the negotiations, and the transaction thus ended. Harris was under no obligation to conclude his offers, the same never having been accepted; and hence, when there was a failure to comply with the condition that he generously made, he was legally and morally relieved from any liability to Johnston by reason of the transactions in question.

From what has been said, it follows that the action of the lower court should be affirmed.

(129 Fed. 79.)

LAMAR et al. v. HALL & WIMBERLY et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904.)

No. 1,274.

1. TRUST FUND—PROTECTION—COMPENSATION.

One jointly interested with others in trust funds, who in good faith maintains for himself and others interested like him necessary litigation to secure or protect them, is entitled to reimbursement out of the funds protected or secured. The principle on which such allowance is based is that the plaintiff represented the others for whom he sued. But a solicitor cannot make another person his debtor by rendering services in his behalf without his express or implied assent.

2. CORPORATIONS—DISSOLUTION—RECEIVERS—TRUST FUNDS—ATTORNEY'S FEES—ALLOWANCE.

Suits having been brought by lien creditors against a corporation, and a receiver having been appointed, petitioners, as attorneys for a minority

stockholder, filed a bill on his behalf, and on behalf of all others similarly situated who should come in and become parties and share in the expense of the proceedings, alleging that the former suits had been brought in bad faith, etc. The bill contained a prayer for the appointment of a receiver to operate the property, pay the debts, and thereafter to turn over to the stockholders the property remaining. A co-receiver was appointed on such petition, the suits consolidated, and after trial, in which the allegations of fraud of the minority stockholder's bill were not proved, the court ordered a sale of the property for the payment of debts. A sale was had, and, on petitioners' application, was set aside for inadequacy of price, and another sale ordered, and an upset price fixed, which was \$40,000 higher than the amount bid at the previous sale, and the property was subsequently sold to the lien creditors for such sum, which was insufficient to pay the liens. *Held*, that the petitioners were not entitled to attorney's fees, payable out of the proceeds of such sale.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Wm. K. Miller, for appellants.

Marion Erwin, John I. Hall, and Olin J. Wimberly, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. Hall & Wimberly and Erwin & Callaway, attorneys and solicitors, filed a petition in the court below praying that fees for services rendered by them be fixed and allowed, and paid out of a trust fund which was in court for distribution. The petition was referred to a special master, who made a report adverse to it; but, on exceptions filed by the petitioners, the report of the special master was disapproved by the court, the exceptions sustained, and a decree entered allowing the petitioners \$1,500 as compensation for their services as solicitors, and directing that the same be paid by the receiver out of the trust funds in court. *William Firth Co. v. Millen Cotton Mills*, 129 Fed. 141. This appeal was taken from that decree, and it is assigned that the court erred in sustaining the exceptions to the master's report, because the solicitors named were not entitled to have their fees paid out of the trust fund in court.

In order to understand the question to be decided, it is necessary to make a statement of the facts:

Three bills in equity were filed in the court below:

(1) *William Firth Company et al. v. Millen Cotton Mills*. This was a suit brought January 6, 1902, by creditors having liens upon the property of the Millen Cotton Mills, a corporation. The bill described the debts and liens, and prayed for their enforcement by a sale of the property of the defendant corporation, and a distribution of the assets among the lien creditors. There was a prayer, also, for the appointment of a receiver of the property of the defendant. The circuit court on January 6, 1902, appointed John R. L. Smith receiver, who took possession of the property of the defendant corporation.

(2) *C. E. Riley & Co. et al. v. Millen Cotton Mills et al.* In this suit, brought April 11, 1902, it was asserted that the complainants had furnished machinery to the defendant corporation, and the complainants claimed liens therefor, and sought to enforce them. It was alleged that the court was already in possession of the defendant corpo-

ration's property, and that the complainants' liens were superior to the mortgage debts; that defendant corporation was insolvent; and that the stockholders had no interest in the property of the defendant corporation "until they pay or cause to be paid off its debts."

(3) *Southern Cotton Mills & Commission Co. v. Millen Cotton Mills et al.* The bill beginning this suit was filed on January 23, 1902, after a receiver had been appointed under the first bill, and after he had taken possession of the property of the defendant corporation. In this suit the complainant's solicitors were Hall & Wimberly and Erwin & Callaway, the petitioners in the court below, whose compensation is involved in the present appeal. The complainant in this suit, a minority stockholder in the Millen Cotton Mills, alleges that the first suit was—

"A part and parcel of a fraudulent and wrongful scheme, purpose, and conspiracy on the part of the defendants herein named to wreck the said Millen Cotton Mills, and cause its properties to be sold and purchased for the benefit of the majority stockholders of the Millen Cotton Mills, to the utter destruction of the rights and interest and property of the minority stockholders therein."

The third paragraph of the bill is as follows:

"Your orator, the Southern Cotton Mills & Commission Company, is a minority stockholder in said Millen Cotton Mills, and brings this bill against the said Millen Cotton Mills and its officers, directors, and majority stockholders, and the other defendants named, colluding and confederating with them: and your orator brings this as a stockholders' bill, for the benefit of itse! and all other stockholders similarly situated who may come in and be made parties hereto, and share the expense and costs of this proceeding."

The details of the wrongful scheme are stated, but it is unnecessary to repeat them. It is alleged that the mill properly operated could reduce and in time pay its indebtedness, and that in that way the property could be saved to the stockholders. In brief, the purpose of the bill was to prevent the sale of the Millen Cotton Mills, on the ground that the suit brought by the William Firth Company and others was a fraudulent scheme between the complainants in that suit and the majority stockholders of the defendant corporation, and to provide for the payment of its debts by operating the mills. The prayer was for the appointment of a receiver or receivers, and that the court "may, through its receiver, hold said property until said property can be turned over to the stockholders who are not participants or guilty of any of the fraudulent acts or wrongs hereinbefore complained of."

This bill was presented to a judge of the court below on January 21, 1902, and an order was made appointing Tracy I. Hickman and John R. L. Smith temporary receivers to take charge of all the property and assets of the Millen Cotton Mills, and its books and papers, "and continue the possession now exercised by John R. L. Smith as temporary receiver." It was further ordered that the receivers investigate the condition of the property, and report to the court the practicability of operating and paying off the debts, in accordance with the "declared purpose of the bill." The defendants named in the several bills filed their several answers. On April 12, 1902, it was ordered

that "the said several cases [referring to the three chancery suits] be consolidated and tried as one cause," and that the temporary receivers be made permanent receivers. On June 7, 1902, an order was made in the cases directing the sale of the property of the Millen Cotton Mills. It provided that the successful bidder should deposit a certified check for \$10,000 on account of his bid. The property was purchased for \$50,000 by Joseph R. Lamar, trustee for the lien creditors. He made the deposit of \$10,000 required by the order. The sale having been reported to the circuit court, the Southern Cotton Mills & Commission Company, represented by Hall & Wimberly and Erwin & Callaway, filed objections to the confirmation of the sale. These objections were sustained, the circuit court refusing to confirm the sale. The circuit court directed the commissioners, who were theretofore ordered to sell the property, to advertise for bids, and to endeavor to procure a bid for it at "an upset price" of \$90,000. Under this order Joseph R. Lamar, trustee for the lienholders, increased his bid to \$90,000, and at that price the sale was confirmed. Lamar, as trustee, having deposited \$10,000 in court under the order, paid the remainder of the purchase money (\$80,000) by crediting the amount on established liens against the property. After paying costs and other allowances out of the money deposited in court, and applying the balance of the purchase money to the lien creditors, there was due to them and unpaid \$7,888.76. Under the order of the circuit court, \$2,000 of the \$10,000 deposited in court was retained in the hands of the commissioners to await the decision of the court on the solicitors' petition for fees.

The single question to be decided is whether or not the solicitor's fees due to Hall & Wimberly and Erwin & Callaway for services which we have described are a proper charge on the trust fund in court.

We wish to say in the beginning that we do not doubt the distinguished attorneys who have made the claim on the trust fund for fees have done so in good faith and under full conviction of the rightfulness of their claim, that the record shows they have rendered services for which they should be compensated, that the amount claimed by them and allowed by the circuit court is not unreasonable, and that we would not hesitate to allow the sum to be charged on the trust fund, if, under established equitable principles, it were a proper charge on that fund.

It may be stated as a general and unquestioned principle that each client should compensate his own solicitor, and that an attorney cannot make another person his debtor by voluntarily rendering services in his behalf without his express or implied assent. The cases which allow compensation to attorneys out of a trust fund are not in conflict with this principle, but are founded upon it, for they depend on the principle of agency; the actual plaintiff being the representative of the beneficiary of the trust. The application of this principle is of everyday occurrence in the courts. Executors, administrators, guardians, receivers, and other trustees, being the agents and legal representatives of the beneficiary or beneficiaries of the trust, are allowed credit for necessary and reasonable charges, including attorney's

fees, incurred by them in the protection and administration of the trust fund. The same principle is extended to other cases. One jointly interested with others in trust property, who in good faith maintains for himself, and others interested like him, the necessary litigation to save it from waste and to secure its proper application, is entitled to the reimbursement of his costs, as between solicitor and client, out of the fund to be administered. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Central Railroad v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915. In such cases the counsel who is employed by certain creditors or other beneficiaries of the trust, and who sues for them and others situated as they are, in a sense represents all of them; those suing having assumed to retain him for all. There is usually an express promise by the parties plaintiff to pay their solicitor, and, if not, a promise to pay him is implied by the performance and the acceptance of the solicitor's services. It seems equally clear that the creditors or other beneficiaries of the trust who come into court and accept a part of the proceeds of the property recovered or preserved by the litigation are bound by an implied promise to pay out of the proceeds of the trust fund received by them their proportionate part of the reasonable compensation allowed the solicitor who successfully conducted the litigation. The underlying principle upon which those who do not appear as plaintiffs are charged with a proportionate part of the solicitor's fees, or upon which such fees are charged on the fund, is that the plaintiffs represented the others for whom they also sued (*Farmers'*, etc., *Trust Co. v. Green*, 79 Fed. 222, 24 C. C. A. 506; *Hand v. Railroad*, 21 S. C. 162); and this agency, and the ratification of the course taken, are usually shown by the appearance in court of the other creditors or beneficiaries, and their claiming to share in the results of the suit.

The solicitors whose claim for fees is before the court represented minority stockholders in the defendant corporation. Before they filed the bill for the minority stockholders, lien creditors of the corporation had brought suit to enforce their liens and to have a receiver appointed, and the court's receiver already had possession of the corporation's property. The minority stockholders did not, therefore, by their bill, bring the property into court. The purpose of the bill was antagonistic to the lien creditors, and to the majority stockholders controlling the Millen Cotton Mills. In fact, both were charged with a fraudulent scheme to sacrifice the property. This charge was not sustained, and we are justified in saying that it was unfounded. The property was sold pursuant to the prayer of the creditors' bills, and contrary to the prayer of the minority stockholder's bill. These facts seem conclusive against petitioners' claim on the trust fund. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940. It is true that, by the opposition of the minority stockholder to the confirmation of the first sale, the bid was increased from \$50,000 to \$90,000. But at both sales it was purchased by the trustee for the lienholders, and at both sales it failed to bring enough to pay the lien debts. It made no difference whether the property sold for \$50,000 or \$90,000. It was paid for in either case by a credit on debts which were worthless, so far as any balance was

concerned which was left unpaid after the application of the amount of the bid as a credit. The interposition of the minority stockholder was of no benefit to the lien creditors. On the contrary, it was to their detriment more than \$2,000, the amount of the increased costs of the litigation. The appellants should not be required to pay out of the fund for services which diminished the fund. *Buckwalter v. Whipple*, 115 Ga. 484, 41 S. E. 1010. But if the interposition of the minority stockholder had been of incidental advantage to the lien creditors, it would not make its attorney's fees a proper charge upon the trust fund. *Farmers', etc., Trust Co. v. Green*, supra. There is no implied promise to pay an attorney whom one has not employed, because of incidental benefits derived from his services. *Grimball v. Cruse*, 70 Ala. 534, 544; *Roselius v. Delechaise*, 5 La. Ann. 481.

But it is urged that after the cases were "consolidated" the solicitors for the minority stockholders aided in obtaining the orders to sell the property and in the administration of the fund. We think that is immaterial. In *Hubbard v. Camperdown Mills*, 25 S. C. 496, 1 S. E. 5, the defendant corporation's property was sold pursuant to the prayer of the minority stockholders' bill; but, the property being insufficient to pay the debts, the court held that the fees of the solicitors for the minority stockholders were not a proper charge on the trust fund. In the case at bar the minority stockholders failed to sustain their bill. And it was a bill opposing the sale of the property and charging fraud. It imposed on the lien creditors the expense of answering it. We are unable to see that it recovered, increased, or protected the trust fund, or that it benefited the lien creditors of the corporation, or that the minority stockholder, the complainant in the bill, for whom the petitioners appeared as solicitors, represented in any way the interest of the lien creditors.

The court is of opinion that the claim of the petitioners, the appellees, is not within the principle which authorizes compensation for their services to be made a charge upon the trust fund in court. The decree of the circuit court, therefore, must be reversed, and the cause remanded, with instructions to dismiss the petition and proceed in conformity to the opinion of this court.

(129 Fed. 84.)

THORNTON et ux. v. MAYOR, ETC., OF CITY OF NATCHEZ.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,253.

1. DEEDS—USE OF PROPERTY—CONDITION SUBSEQUENT.

A deed, for a consideration alleged to have been nominal, conveying land to a city to be used as a burying ground, and forever kept, used, and inclosed in a decent and substantial manner, and for no other use or purpose whatsoever, in which the grantors made no record of any intention on their part that the land should ever under any circumstances revert to them or their representatives, should not be construed as requiring the land to be maintained as a public burying place literally in perpetuity, without regard to the welfare of subsequent generations; and hence such provision was not a condition subsequent, the breach of which would terminate the title of the grantees.

2. SAME—BILL—DEMURRER.

Where the members of a firm conveyed land to a city, to be used as a public burying ground forever, a bill by the legal representatives of the members of such firm to recover the land on the ground that its use had been illegally changed, which failed to show that plaintiffs were entitled to the reversion, or that they had any interest or right in the further carrying out of the purpose of the grant, was demurrable.

3. SAME—LACHES.

Lands sued for had been conveyed by plaintiffs' decedents in 1817 to a city for cemetery purposes, and for no other use whatsoever. In 1890 the city took up the remains of the bodies previously buried therein, and deposited them in a mound in a remote portion of the land, marked with a plain stone, and thereafter improved and used the land conveyed as a public park. *Held*, that since the personal representatives of the grantees, by the exercise of reasonable diligence, could have had knowledge of such change of use shortly after it occurred, and before 1901, when suit was brought to recover the land, they were barred by laches from maintaining the same.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

On July 25, 1902, M. E. Thornton and his wife, averring themselves to be the sole surviving legal representatives of William Rutherford and of William Rutherford and John P. McNeel, who in the year 1817 composed the commercial firm of William Rutherford & Co., filed their bill in the lower court, in which, *inter alia*, they alleged that Rutherford and McNeel in the year 1817, for the nominal consideration of \$500, conveyed to the president and selectmen of the city of Natchez, and to their successors, forever, certain lots in the city of Natchez, which were then the property of said commercial firm, to have and to hold the same "for the uses and purposes of a burying place and so to be forever kept, used and enclosed in a decent and substantial manner and to and for no other use or purpose whatsoever"; that the land continued to be used for the purposes to which it was dedicated by the grantors until about the year 1890, when the board of mayor and aldermen of the city of Natchez, without the knowledge or consent of complainants, who then resided in North Carolina, and without notice to them, contriving and intending to defeat the said trust, and to convert the land to another and a different purpose, but at the same time to deceive the complainants, and to preserve the semblance of the trust, while defeating the intent of the grantors without an actual, apparent repudiation of the trust, caused the remains of the deceased persons interred in said land, with the tombstones, coffins, and all other evidences of the use of the land as a burying ground, to be dug up and removed, and the land to be graded down and leveled and converted into a public park, for the purposes of diversion and recreation, for the use of the city of Natchez, and ceased altogether to use the land for the purpose of a burying ground, but that, for the purpose of deceiving complainants, or others who might have notified them, said city authorities caused an excavation to be dug in a remote part of the land, and the remains of some of the deceased persons formerly buried in said land to be placed therein, and a small mound of earth to be placed thereon, with a plain slab of stone, and then contended and still contend that in so doing they are executing the trust in conformity to the terms of the grant; that, by reason of the fraud so attempted to be practiced on them, complainants had no notice of the breach of trust and of the fact that the lands had ceased to be used for the purpose of a burying place, and had been converted to another and entirely different use, until the year 1901; that by the misuser and nonuser of the land, which is of the value of \$10,000, the same has reverted to the complainants. The prayer is that the land be decreed to have reverted to the complainants, and that the defendants pay rents and revenues at the rate of \$1,000 per annum from January 1, 1890, or, in the alternative, that defendants be perpetually enjoined from further user of the land for any other different purpose than that of a burying place. A demurrer was interposed on a number of grounds, among which are the following: Want of equity

in the bill. Want of jurisdiction in the court, because the suit is an action of ejectment; and, if it be a bill to remove clouds from title, it cannot be maintained, because complainants are not, and the defendants are, in possession. That complainants do not show that they have acquired or hold the interest of McNeel in the land. That by the terms of the deed, as shown in the bill, the fee passed absolutely and unconditionally to the city of Natchez, and that no provision was made in the deed by which the grantors, their heirs or legal representatives, could be reinvested with the title. That complainants are barred by their laches. That the suit is barred by the 10-year statute of limitations. That the bill does not show that complainants' cause of action was fraudulently concealed. That the bill shows that defendants exercised such public ownership over the land as to render it impossible that complainants had they exercised reasonable diligence, would not have known of their rights more than 10 years before the filing of this suit. That complainants' alleged want of knowledge will not excuse them from the bar of the statute of limitations. The demurrer was sustained, the bill was dismissed, and the complainants have appealed.

Wade R. Young, for appellants.

McWillie & Thompson, for appellees.

Before McCORMICK and SHELBY, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge. We are satisfied, after full consideration of the matter, that the grant was not made on condition subsequent. Such a condition is not favored in law. 4 Kent's Com. marg. p. 129. Even when a provision is stated in terms to be a condition, a court will determine for itself, not from the statement alone, but from the whole deed or grant, whether a condition was really intended. In this case no condition was stated in terms. A consideration of \$500 was paid the grantors, and the grant was not made purely and exclusively from motives of charity or benevolence. No provision whatever was made for re-entry by or reversion to the grantors or their heirs or legal representatives. The land was maintained as a public burying place for nearly three-quarters of a century. There is nothing averred in the bill from which we could gather that the grantors intended that the land should be maintained as a public burying place literally in perpetuity, and without regard to the necessities and welfare of all the generations which were to follow. In the absence of any declaration of such an intention, and of anything in the grant from which it could be reasonably inferred, we are to conclude that the grantors meant that the land should be used for the purposes for which they desired it to be used, as long as it was right and proper to do so, in view of the nature of the grant and of its purposes.

But, in any event, it is beyond question that the grantors made no record of any intention on their part, either expressed or intimated, that the land should ever under any circumstances revert to them or to their representatives. The appellants have not stated a case entitling them to the reversion. They have not even shown that they have an interest or a right in the further carrying out of the purposes of the grant.

The matter in hand was carefully considered in the able opinion in *Rawson v. Inhabitants of School District No. 5 in Uxbridge*, 89 Mass. 125, 83 Am. Dec. 670. Also see *Greene v. O'Connor* (R. I.) 19 L. R. A.

262 (see notes). *Sohier v. Trinity Church*, 109 Mass. 1-19; *Episcopal City Mission v. Appleton et al.*, 117 Mass. 326; *Barker et al. v. Barrows*, 138 Mass. 578; *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502.

We are furthermore fully satisfied, after consideration of the statutes of limitations of Mississippi, that the appellants have by their laches debarred themselves from prosecuting this action. The conversion of a public burying ground into a public park, and the other acts which the appellants averred in support of the fraud and concealment alleged by them, could not but have been open, public, and notorious. Concealment of those acts would have been impossible. The bill, it is true, avers that the appellants had neither notice nor knowledge. But such an allegation, in a matter like the one in hand, is a mere conclusion of the pleader, not binding on demurrer, unless facts are stated from which the court can determine for itself whether the conclusion was correctly drawn. See *Wood v. Carpenter*, 101 U. S. 135-140, 25 L. Ed. 807.

The acts complained of took place in the year 1890. Either the appellants knew of those acts prior to the year 1901, or else they could have had the knowledge by exercising reasonable diligence. The appellants, having allowed such a lapse of time to occur before bringing their action, cannot be heard to complain at this late hour. In view of the statutes of limitations of Mississippi, we do not understand that the appellants' counsel contends that the appellants were entitled to actual notice. But see *Elder v. McClaskey et al.*, 70 Fed. 529, 17 C. C. A. 251.

There are other matters averred in the demurrer which have much force. But we deem it sufficient to rest our affirmance of the decree appealed from on the two grounds stated.

The decree of the lower court is affirmed.

(129 Fed. 87.)

BRISTOL V. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

1. PAUPERS—PROSECUTION OF SUITS—COMMON LAW.

St. 11 Hen. VII, c. 12, providing that every poor person having a cause of action against another shall have writs, according to the nature of his cause, without payment of fees, and assignment of counsel by the court, who shall act for him without reward, had reference only to a plaintiff prosecuting a civil action, and did not apply to criminal appeals.

2. SAME—FEDERAL STATUTES—CRIMINAL CASES—WRITS OF ERROR.

Act Cong. July 20, 1892, 27 Stat. 252, c. 209 [U. S. Comp. St. 1901, p. 706], providing that any citizen entitled to commence any action or suit in any court of the United States may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor, before or after bringing suit or action, does not entitle a defendant in a criminal case to prosecute a writ of error out of the United States Circuit Court of Appeals in forma pauperis, such writ constituting a continuation of the original litigation, and not a commencement of a new action.

In Error to the District Court of the United States for the Northern District of Illinois.

63 C.C.A.—34

J. J. McClellan, for plaintiff in error.

S. H. Bethea, U. S. Dist. Atty.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. The plaintiff in error, having been convicted in the court below upon an indictment charging the use of the post-office department for a fraudulent purpose, and thereupon sentenced to a term of imprisonment, has sued out a writ of error from this court, and now moves the court, upon a conceded showing of poverty, for leave to prosecute such writ of error in forma pauperis. At the common law no plaintiff has the right to sue in forma pauperis. Any such right must rest upon statute. By 11 Hen. VII, c. 12, every poor person having a cause of action against another could have writs according to the nature of his cause without payment of fees, and assignment of counsel by the court, who should act for him without reward. This statute came to us as part of the common-law existing at the time of the Revolution. It is followed as well by the federal as the state courts, unless the matter is otherwise regulated by the Congress of the United States or by the Legislature of the respective states. It is clear that this statute had reference only to a plaintiff prosecuting a cause of action. It comprehended only civil actions, there being at the time of its adoption, and for five centuries thereafter, no review in England of a criminal action. If, then, this application can be sustained, it must be by force of some statute of the United States. Section 691, Rev. St., provides for review, by appeal or writ of error, of civil actions. This provision was adopted in 1789. 1 Stat. 84, c. 20, § 22. No review of a criminal cause, except upon a certificate of division of opinion among the judges of the Circuit Court (2 Stat. 159, Rev. St. §§ 651, 697), was allowed until the act of February 6, 1889, 25 Stat. 656 [U. S. Comp. St. 1901, p. 569], and then only in cases of conviction of a capital crime. *United States v. Sanges*, 144 U. S. 310, 321, 12 Sup. Ct. 609, 36 L. Ed. 445. The first act allowing generally a review in criminal cases is that of March 3, 1891, 26 Stat. 826, c. 517 [U. S. Comp. St. 1901, p. 549]. Prior to that time provision had been made in aid of poor persons indicted for an offense. The court was authorized to issue subpoenas for his witnesses, who were to be paid by the government (Act 24th Sept. 1789, 1 Stat. 91, Rev. St. U. S. § 878 [U. S. Comp. St. 1901, p. 668]), and the court, by virtue of its inherent power, could appoint counsel to defend the poor prisoner. The act of July 20, 1892, 27 Stat. 252, c. 209 [U. S. Comp. St. 1901, p. 706], provides that any citizen "entitled to commence any action or suit in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs or give security therefor before or after bringing suit or action," and upon filing a statement under oath that because of his poverty he is unable so to do, and his belief that he is entitled to the redress sought, and setting forth briefly the nature of his alleged cause of action. There exists a divergence of opinion in the federal courts whether this act embraces an appeal or writ of error in civil causes. First Circuit: *Volk v. B. F. Sturdevant*, 99

Fed. 532, 39 C. C. A. 646; Sixth Circuit, *Reed v. Pennsylvania Company*, 111 Fed. 714, 49 C. C. A. 572, upholding that contention, and *The Presto*, 93 Fed. 532, 35 C. C. A. 534, denying it. The first two cases hold that proceedings on appeal or writ of error are within the spirit of the statute, and are not excluded by the letter, the act authorizing a poor person to "commence and prosecute to conclusion his cause of action." The last case limits the act to the proceeding in the court of original jurisdiction. All of the cases to which we have been referred or which we have been able to find which construe the act are civil causes, where the plaintiff makes the application claiming to have a meritorious cause of action to enforce. We have searched in vain for any federal decision construing this act with reference to its application to criminal cases. It is clearly the design to permit a poor person who is "entitled to commence any action or suit" to "commence and prosecute to conclusion" upon a showing of poverty, and his belief that he is entitled to the redress sought, and setting forth the nature of his alleged cause of action. Can such an act be applied to a defendant in a criminal prosecution? This act does not give him a right to defend as a poor person in the court of original jurisdiction. He obtains that right from prior law. The statute, then, has no reference to criminal cases in the court of original jurisdiction, for the action is not commenced or prosecuted by the defendant, and does not involve a cause of action existing in him. If the statute be applicable, it can only be applied upon the suing out of a writ of error to review a conviction. Is such a writ of error the "commencement of an action or suit" within the meaning of the act, or is it not rather the continuation of the old suit in which he is defendant, and to obtain a new trial therein? The office of a writ of error, said Chief Justice Marshall, is simply to bring the record into court, and to submit the judgment of the inferior tribunal to re-examination. A writ of error has been called an original writ, because it issued out of a reviewing court and was directed to the trial court; but it acts upon the record rather than upon the parties, removing the record into the supervising tribunal. The Supreme Court declares it to be "rather a continuation of the original litigation than the commencement of a new action." *Nations v. Johnson*, 24 How. 195, 205, 16 L. Ed. 628; *In re Chetwood*, 165 U. S. 443, 461, 17 Sup. Ct. 385, 41 L. Ed. 782. We do not think that it can properly be said that a writ of error is a suit or action within the statute so far as respects a writ of error in a criminal case. Were it not for the words "prosecute to conclusion," we doubt if any court would hold that the act applied to an appeal or writ of error in a civil cause. The applicant by the statute must declare the nature of his cause of action. Surely an erroneous ruling by the trial court cannot be held to furnish a "cause of action," as that phrase is commonly understood. The statute by that term, in our judgment, refers to a legal demand by one against another, not to the rulings of a trial court. Under a somewhat similar statute of the state of New York, its Supreme Court, speaking through Judge Cowen, held that the provisions of the statute do not extend to writs of error. *Moore v. Cooley*, 2 Hill, 412. The law is generous, giving to a poor defendant in a criminal cause full right of defense, producing in court his witnesses, giv-

ing him the services of experienced counsel, and that without expense to him. It provides for him a full and fair trial before an impartial court and jury. If the Congress designed to give him the opportunity of a review of that trial at the further expense of the government, it should have expressed such design in unambiguous terms.

The motion is denied.

(129 Fed. 90.)

UNITED STATES v. DOWNING et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 70.

1. CUSTOMS DUTIES—CLASSIFICATION—CARBONS FOR ELECTRIC LIGHTING—EARTHY OR MINERAL SUBSTANCES.

Sticks of carbon intended and adapted to be used in electric lighting, but requiring to be cut into shorter lengths and to have the ends shaped before they are suited for such use, are dutiable under the provision in paragraph 97, Tariff Act July 24, 1897, c. 11, Schedule A, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], for "articles and wares composed wholly or in chief value of * * * carbon, not specially provided for, * * * if not decorated," and not under paragraph 98 of said act, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], as "carbons for electric lighting."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal by the United States from a reversal (120 Fed. 1014) of a decision of the Board of General Appraisers (G. A. 5,020, T. D. 23,353), which affirmed the assessment of duty by the Collector of Customs at the port of New York on merchandise imported by R. F. Downing & Co.

D. Frank Lloyd, for appellant.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The question in this case is whether the importations in controversy were dutiable as "carbons for electric lights," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 98, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], or as "carbon, not specially provided for" under paragraph 97 of that act. They were sticks of carbon intended and adapted to be used in electric lighting, but not yet completed for such use when imported. They were of different lengths, but required to be cut into shorter lengths, and to have the ends pointed or ground, before they could be adapted to use in electric lighting. Paragraph 97 reads as follows:

"97. Articles or wares composed wholly or in chief value of earthy or mineral substances or carbon not actually provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem."

The Board of General Appraisers were of opinion that the importations were dutiable under paragraph 98 by similitude, because they were not enumerated in paragraph 97. The question was de-

cided by this court in *United States v. Reisinger*, 94 Fed. 1002, 36 C. C. A. 626, a case where the importations were precisely like those now in controversy, and the question arose under the same two paragraphs of the tariff act. We held that, because it was necessary to bestow further labor on them in order to fit them for use in electric lighting, they were not included in paragraph 98. We said:

"Inasmuch as they are not specifically provided for in paragraph 98, they come within the general phraseology of paragraph 97, being articles or wares composed wholly of carbon. This paragraph, it should be noted, is changed from a similar one in Act Aug. 27, 1894, c. 349, § 1, par. 86, 28 Stat. 513, Schedule B, which was recently considered by us in *United States v. Reisinger*, 91 Fed. 112, 33 C. C. A. 395, by the insertion of the word 'carbon.'"

In the *Reisinger* Case, previously decided, the court considered the question whether carbon points for arc lights were dutiable under paragraph 86 of the act of 1894, which reads as follows:

"All articles composed of earthen or mineral substances, including lava tips for burners, not specially provided for in this act, if decorated in any manner, forty per centum ad valorem; if not decorated thirty per centum ad valorem."

In its opinion the court held that carbon points were not enumerated in this section, because the broad and general phrase "articles composed of earthen or mineral substances" should be restricted to articles susceptible of decoration, or, more accurately expressed, to articles of a class which sometimes are decorated and sometimes are not. The court deemed this construction the correct one, because of the collocation of paragraph 86 with other paragraphs of the schedule, and because otherwise Congress would not have deemed it necessary to provide specially for "lava tips," as they would be included in the general phrase. The majority of the Board of General Appraisers in the present case seem to have been misled by this decision, and to have overlooked the distinction between the old provision and the new, created by inserting "or carbon," and to which we adverted in the later *Reisinger* Case. The earlier decision was, in effect, that, reading paragraph 97 as though the words "or carbon" had been omitted, it would not cover the importations in controversy. The later decision was that, reading it as it stands, with the words "or carbon" inserted, it covers the importations because they are articles made wholly of carbon, not decorated. There is no inconsistency in the two decisions, as is clearly shown in the opinion of Mr. Appraiser Somerville, dissenting from the decision of his colleagues.

The decision of the court below reversing the decision of the Board of General Appraisers is affirmed.

(128 Fed. 922.)

BUCHANAN et al. v. BRYANT ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. February 24, 1904.)

No. 40.

1. PATENTS—INFRINGEMENT—INCANDESCENT LAMP SOCKETS.

The Lange patent, No. 434,153, for an incandescent lamp socket, claims 1 and 2, were not anticipated, and disclose patentable invention. Also held infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 124 Fed. 537.

Edward P. Payson, for appellants.

Hubert Howson, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree for an injunction and an accounting in a suit which was brought by the appellee against the appellants upon letters patent No. 434,153, dated August 12, 1892, issued to Philip Lange, for incandescent lamp sockets. The claims involved are:

"(1) In a key-socket, the combination, with the base, of the base-plate contained therein, screws passing through the sides of the base holding said base-plate in position, lugs carried by the base through which said screws pass, and a recess in the base-plate fitting over the lugs.

"(2) In a key-socket, the combination, with the base, of the base-plate contained therein, screws passing through the sides of the base holding said base-plate in position, lugs carried by the base through which said screws pass, and a shell extending between the lugs and the base, and held in position by pressure."

The specifications of error which relate to the defense of anticipation have not been insisted upon, and from the brief of appellants it appears that the contentions upon which they do rely are (1) that, in view of the prior state of the art, the claims sued on are both invalid for lack of invention; (2) that claim 2, at least, is void, because it contains "nothing patentable over claim 1"; (3) noninfringement of either claim.

We find nothing in this record to sustain the appellants' contention that the production of the subject-matter of these claims did not involve invention. The proofs clearly show that the sockets previously in use were unsatisfactory, and that they were practically superseded by the Lange sockets; and while such facts do not in all cases necessarily import invention, we think that under the circumstances of this case the inference that the inventive faculty, and not merely the skill of the calling, was exercised, cannot be avoided. The construction of a socket to meet practical requirements, presented a problem of much difficulty, and it was to that problem that Lange directed his attention. As stated in his specification, his object was "to simplify and improve the mechanical construction of the device, and thereby lessen its parts and increase its durability," and this object he attained by the assembling of the three main parts

or division of the structure—the base, the mechanism, and the exterior shell—into one unit mechanically, in a convenient, strong, and serviceable manner. As complainant's expert correctly explained, claims 1 and 2 "have particular reference to those features of the construction by which the several parts are adapted to one another and held together." Claim 1 "is addressed to the union of the socket-base with the base-plate of the interior mechanism by means of the lugs, * * * and into which the screws are threaded, and through which they pass into the recesses in the base-plate whereby the interior mechanism is held in position, whether the exterior shell is present or not, and permitting the removal of the latter, while the base-plate, with its connection and the wires leading thereto, remain undisturbed"; and claim 2 "is evidently directed to the method of holding the exterior shell by clamping it in position between the lugs and the base, whereby a strong gripping pressure is exerted to hold the shell against displacement by rough handling, the weight of the shade, and the like, while permitting it to be quickly and readily removed by the simple loosening of the two screws." The beneficial result achieved was a construction in which a base of thin sheet metal could be used, while at the same time providing a satisfactory means of uniting and fastening the several parts; and this was accomplished, not by borrowing anything from the prior art, nor by applying to it the skill of a mechanic or electrical engineer, but by the conception and adoption of means which the existing art, as disclosed by the prior patents adduced by the defendants, did not have nor suggest. We are satisfied that the views of the complainant's expert respecting them are correct, and; accepting his testimony, without expanding this opinion by quoting it, it results that we cannot affirm the appellants' proposition that "the Lange apparatus did not involve any act of invention, or anything more than the expected skill of the calling, applied to the existing art."

Each of these claims is for a combination, and, though it is true that several important elements are common to both of them, yet claim 1 calls for a recess in the base-plate fitting over the lugs, while claim 2 does not; and claim 2 not only contains the first mention of a shell, but also defines the particular shell intended as "a shell extending between the lugs and base, and held in position by pressure." Hence it appears that the two claims are certainly not identical, and, in our opinion, the difference between them is, with reference to the patent law, a substantial and material one. As has already been said, claim 2 is directed to the method of holding the exterior shell by clamping it in position between the lugs and base, whereby a strong gripping pressure is exerted to hold the shell against displacement; and this the specification makes perfectly plain. It says:

"The screws, b, pass freely through the flange of the base, and screw into the lugs, and by means of them the outer shell * * * may be held firmly between the flange of the base and the lug. * * * When the screws are tightened, they pinch the shell between the flange of the base, a, and the lugs, b, holding them securely in position."

The feature here referred to is, we think, a manifestly important part of the invention. It is not, as has been argued, merely functional. It is constructive, the construction for which it provides being a socket in which the shell of claim 2 is held in position by pressure of the screws mentioned in both claims. Therefore we cannot agree that claim 2 "contains nothing patentable over claim 1."

The appellants' propositions upon the question of infringement are that "the appellants' apparatus is not an infringement, * * * because, so far as claim 1 is concerned, it has neither the recess, b¹, nor any equivalent thereof," and because, as to claim 2 it "does not rely upon pressure to hold its shell in position, but upon a bayonet joint." It is true that the appellants' recesses appear to be shallower and wider than those shown in the patent in suit; but that they actually exist, and, notwithstanding their apparent differences, serve the same purpose as those of the patentee, and accomplish that purpose in substantially the same way, though perhaps not so efficiently, we think is obvious. Therefore, though not proportionally and in shape the same, in all that is essential they are identical. The testimony of complainant's expert upon this subject is convincing; and from his elucidation of the prior art, which we agree with the court below in approving, it clearly appears that it exhibits nothing which would justify us in so limiting this recess feature of the Lange construction as to admit of the appropriation of the entire combination of which it is an element, by any one ingenious enough to devise such merely colorable changes in that feature as are relied upon by these defendants to relieve them from the charge of infringement.

As to the contention that in the appellants' apparatus pressure is not relied upon to hold the shell in position, we need only say that an inspection of that apparatus, and examination of the evidence, leaves us in no doubt that the court below was right in finding that the shell is, in fact, held in position by pressure, and we adopt the statement of the learned judge of that court that "inspection of the two sockets will show at once, * * * that there is scarcely any room to dispute that in each the shell is held in place by the same means, and that the bayonet joint of the defendants' socket would be ineffective without the screws." Indeed, this was, in effect, admitted by Mr. Proctor, a witness for the defendants below. He testified that it is the duty of the wire man in putting up the defendants' sockets, after he has fitted the shell to the cap, to screw up the screws as far as they will go; that, if the screw is tightened as much as possible, the shell will be held tightly between the lugs and the flange of the cap; and that "the purpose of screwing up these screws as far as they will go is to hold all the parts of the socket together as firmly as possible."

For the reasons stated, we are of opinion that the Circuit Court was right in holding that the claims in suit were valid, and that they had been infringed by the appellants, and therefore the decree of that court is affirmed, with costs.

(129 Fed. 305.)

WEIDENFELD v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1904.)

No. 1,942.

1. CORPORATIONS—RAILROADS—PREFERRED STOCK—RETIREMENT—CONVERSION.

Laws Wis. 1895, c. 244, p. 475, chartered the Northern Pacific Railway Company, and authorized it to classify its stock into common and preferred, and to make such preferred stock convertible into common, on such terms and conditions as might be fixed by the board of directors. The act also authorized the company to borrow from time to time such sums of money and on such terms as the corporation or its board of directors should agree, and in its corporate name to execute evidences of indebtedness, and make the same convertible into its capital stock of any class upon such terms and conditions as its board of directors deemed advisable. *Held*, that the corporation, under such provisions of its charter, had authority to issue certificates of indebtedness with which to retire the preferred stock, and to immediately convert such certificates into common stock.

2. SAME—RATIFICATION.

The certificates of indebtedness having been issued under express statutory authority conferred by Laws Wis. 1895, p. 475, c. 244, § 11, the conversion, even if not originally authorized, was subsequently confirmed by Laws Wis. 1897, p. 632, c. 294, and Laws Wis. 1899, p. 296, c. 193, authorizing the consolidation of railroad companies, validating agreements on which their stocks had been issued, together with their plans of reorganization, etc.

3. SAME—REDUCTION AND INCREASE OF STOCK.

Where a corporation issued certificates of indebtedness with which to retire its preferred stock, and immediately thereafter converted such certificates into common stock, such transaction should be considered as a whole, and hence the issuance of the certificates and retirement of the preferred stock did not operate as a reduction of capital, nor the issuance of such additional common stock as an increase thereof.

4. SAME—RIGHTS OF STOCKHOLDERS.

Where a corporation issued certificates of indebtedness with which to retire its preferred stock, for which the holders of the common stock were entitled to subscribe, a common stockholder could not object that the transaction was invalid on the ground that the preferred stockholders were not entitled to share therein.

5. SAME—PREFERRED STOCK—STOCKHOLDERS' RIGHTS.

Where, at the time of the reorganization of a railroad company, preferred stock was issued under a resolution of the stockholders on the express condition that the company, at its option, might retire the same at its election on certain dates, and each certificate contained a recital of such condition, each preferred stockholder acquired his stock subject to the terms of an express contract which denied him the right to share in new stock issued as a part of a scheme for the retirement of such preferred stock, and that when his stock was so retired he thereupon became a stranger to the company.

6. SAME—ACTIONS AGAINST CORPORATION—PARTIES.

Where a stockholder of a corporation brought suit to restrain it from carrying out a scheme to retire its preferred stock and to issue common stock in its place, but the thing primarily complained of was the ownership of a majority of the corporation's stock by a securities company formed for that purpose, the end sought being the destruction of the securities company's title to its stock and its status as a stockholder, the securities company is an indispensable party defendant, and is not represented in the suit by the corporation.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This is an appeal from a decree dismissing the appellant's intervening petition. The suit was originally instituted by one Peter Power in the district court of Hennepin county, Minn. By his verified bill of complaint, which was filed December 30, 1901, Power alleged that he was then, and had been for more than six months, the owner and holder of 100 shares of the common stock of the defendant, the Northern Pacific Railway Company. He complained that the company, without authority of law, was about to retire all of its preferred stock, amounting to \$75,000,000; also that the board of directors and other officers of the company had entered into an illegal combination and conspiracy with similar officers of the Great Northern Railway Company and of the Chicago, Burlington & Quincy Railway Company for the purpose and with the object in view of merging and consolidating the railway systems of the three companies, which were alleged to be parallel and competing, under one management, in violation of the laws and public policy of the United States, the state of Minnesota, and the other states traversed by said railroad systems, and that to accomplish such merger and consolidation they had caused to be incorporated under the laws of the state of New Jersey a corporation known as the Northern Securities Company, with authority to purchase and hold the stocks, bonds, and securities of other corporations, the intention being to cause a majority of the stock of all three companies mentioned to be transferred to the securities company, and to be controlled by it, thereby securing the conduct of the entire business of the three systems by one corporation, and the illegal suppression of competition. It was also alleged by Power that the movement to retire the preferred stock of the Northern Pacific was for the sole purpose of enabling those stockholders and officers who favored the merger to accomplish their unlawful purpose. The relief sought by Power was the prevention by injunction of the retirement of the stock and of the consummation of the merger. The cause was removed by the defendant company to the Circuit Court of the United States for the District of Minnesota, the complainant, Power, being a citizen of the state of New York and the defendant a citizen of the state of Wisconsin. The proofs taken by the defendant showed conclusively that Power never owned any stock in the Northern Pacific Railway Company, and had no interest whatever in any of the matters alleged in his complaint. When the cause was ready for hearing in September, 1902, and long after the retirement of the preferred stock of the Northern Pacific and its conversion into common stock of that company, the appellant, Camille Weidenfeld, by leave of court filed his intervening petition, the averments of which, though much more specific and in detail, are substantially along the lines of the original bill. The principal difference relates to the acquisition of the stock of the Chicago, Burlington & Quincy Company by the other companies—a difference which is not material to a determination of the controlling issues in the case. Weidenfeld alleged that since December 26, 1901, he was the owner and holder of 100 shares of the common stock of the defendant of the par value of \$100 each. The prayer of his intervening petition was that all of the steps and proceedings taken by the defendant, its officers, directors, and stockholders, looking to the organization of the securities company and the transfer to it of the controlling interest in the stock of the defendant, be adjudged fraudulent and void; that the defendant be adjudged to have combined and consolidated its stock, property, and franchises with the stock, property, and franchises of the Great Northern Company, a parallel and competing line of railway, contrary to the laws of the state of Minnesota; that the organization of the securities company by the defendant and those associated with it be held and adjudged to be a conspiracy in violation of the law and policy of the state of Minnesota, and that all transfers of stock in the defendant company to it be adjudged to have been in furtherance of the conspiracy and void; and generally that a continuance of such conspiracy and combination by the company, whether by its directors, officers, and agents, or by its constituent members or stockholders, be enjoined; and for general relief.

The facts relating to the merger are substantially those which were recited and passed upon by the court below in *United States v. Northern Securities*

Co. (C. C.) 120 Fed. 721, and a full narrative of them is unnecessary here. The above outline of the averments in the pleadings and of the prayers for relief is sufficient for the purpose of this appeal. A reference more in detail, however, should be made to that feature of the case relating to the retirement of the preferred stock. The defendant, Northern Pacific Railway Company, derives its corporate existence from certain laws of the state of Wisconsin. Originally incorporated as the Superior & St. Croix Railroad Company, its name was changed on the 1st day of July, 1896, about the time of its acquisition of the properties of the Northern Pacific Railroad Company which were then in the hands of a reorganization committee. To enable the defendant to effect such acquisition, its capital stock, which was theretofore \$5,000,000, was increased to \$155,000,000, divided into \$75,000,000 of preferred stock and \$80,000,000 of common. This increase of the capital stock and its classification into preferred and common were duly authorized by law and by the unanimous vote of the stockholders. The resolution of the stockholders recited as an express condition to the issue of the preferred stock that the company might, at its option, retire the same in whole or in part, at par, from time to time, upon the 1st day of any January prior to 1917. Accordingly each certificate of preferred stock, the form of which was prescribed by the board of directors and thereupon approved by the stockholders, contained the condition that "the company shall have the right, at its option, and in such manner as it shall determine, to retire the preferred stock in whole or in part, at par, from time to time upon any 1st day of January prior to 1917." The same recital appears in every certificate of common stock issued by the company. The preferred stock possessed a preferential 4 per cent. noncumulative dividend feature, with provision for the ratable division of the remainder of the surplus net earnings in any fiscal year among all of the stock of both classes, after an equal payment upon the common. It was provided by chapter 241, p. 475, of the Laws of 1895 of the state of Wisconsin, which is one of the various acts conferring upon the defendant company its corporate existence and its powers, that it should possess authority to classify its stock into common and preferred, and to "make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors." By the act mentioned the company was also "authorized to borrow from time to time such sums of money and upon such terms as the corporation or board of directors shall agree upon or authorize as necessary and expedient; and in its corporate name execute and deliver its notes, bonds, debentures or other evidences of indebtedness in such form as shall be from time to time prescribed by the board of directors and in such amount as shall be deemed from time to time by said board expedient; and may make the same convertible into its capital stock of any class upon such terms and conditions as to the board of directors may seem advisable." And general power was conferred upon the board of directors to use such evidences of indebtedness in any manner which, in their judgment, would subserve and promote the corporate purposes. By another section of the act it was provided, with certain exceptions not material here, that "all of the affairs of said company shall be managed by a board of directors, who shall be stockholders, and are hereby vested with all the powers of the corporation." On November 13, 1901, the board of directors of the company adopted a resolution by which it was determined to retire the entire issue of preferred stock at par upon the 1st day of January, 1902, the funds for such purpose to be obtained by the issue and sale of certificates of indebtedness or bonds which were convertible at their face into common stock at par. The plan pursued was in strict conformity with the terms of the resolution. The holders of the preferred stock were duly notified that their stock would be retired on January 1, 1902. Certificates of indebtedness aggregating \$75,000,000, dated November 15, 1901, maturing January 1, 1907, and bearing interest at 4 per cent. after January 1, 1902, were issued. They were at once offered to the common stockholders at par, each stockholder being given the right to subscribe for and purchase the same to the amount of $\frac{75}{80}$ of the amount of common stock owned by him. On November 15, 1901, a contract was entered into with the Standard Trust Company of New York, whereby the latter agreed to purchase such of the certificates as were not taken by the common stockholders. The certificates, according to their terms, were, at the option of the company, convertible into common stock at par at any time

after their date, and likewise so convertible upon demand of the certificate holder at any time after January 1, 1902. Immediately after the certificates were issued, the company, acting through its board of directors, exercised its option to require their conversion into common stock. The result was that on January 2, 1902, all of the preferred stock of the company had been retired, all of the certificates of indebtedness had served their temporary purpose and had been retired, and the place of the preferred stock in the capitalization of the company had been taken by an equal amount of the common stock, the aggregate capitalization of \$155,000,000 being preserved and maintained.

The intervention of the appellant was heard upon the proofs taken in the main branch of the case. The Circuit Court, upon final hearing, dismissed Power's original bill of complaint and appellant's intervening petition. Power did not appeal.

M. H. Boutelle and A. W. Bulkley (Bulkley, Gray & Moore, on the brief), for appellant.

C. W. Bunn and F. B. Kellogg (C. A. Severance, on the brief), for appellee.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appellant's objections to the conversion of the preferred stock of the Northern Pacific into common stock are: (1) That the retirement of the preferred stock constituted a decrease of the corporate capitalization without authority of law; (2) that the issue of the convertible certificates of indebtedness was not for the acquisition or construction of additional lines of railroad or other properties, and was therefore unauthorized and void; (3) that after the decrease of the capitalization by the retirement of the preferred the issue of an equal amount of common stock was an unauthorized increase in the capitalization. Appellant also contends that the reservation by the company of the option to retire the preferred stock, and the insertion in all of the certificates of stock of both characters of a recital of such reservation, were without authority of law; also that the scheme of retirement and conversion was void for the reason that the privilege was not accorded the preferred stockholders of subscribing to the new issue of common stock. The answer to these various contentions may be briefly stated. In the reorganization of the Northern Pacific Railroad Company and the acquisition of its properties by the defendant in 1896 the bonded indebtedness of the former was converted into the preferred stock of the latter, and in consideration of that fact the reorganization committee and the holders of the securities and the stock of the two companies expressly contracted that the defendant should have the right to retire such stock on the 1st day of any January prior to 1917. To avoid error on the part of any one subsequently dealing in the stock of the defendant, every certificate that was ever issued by it bore upon its face an evidence of such agreement. The preferred stock was intended to be of a temporary character, and to retain in some measure the quality of the original indebtedness, which it succeeded. We do not doubt that the defendant possessed adequate authority to so condition it under the broad and comprehensive powers conferred by its charter, but,

even if what it did in that respect was not originally authorized, confirmation may be found in the subsequent legislation of Wisconsin. Chapter 294, p. 632, Laws 1897; chapter 193, p. 296, Laws 1899. The certificates of indebtedness which were designed to provide a fund with which to retire the preferred stock were issued pursuant to express statutory authority, the limitation being that of a lawful corporate purpose; and these in turn were with like authority convertible into the common stock of the company. Section 11, c. 244, p. 483, Laws 1895.

Counsel in their criticisms have adopted too narrow a view of what was done under the resolution of November 13, 1901. The capital stock of the company was not reduced, nor was it increased. The various steps which were adopted should not be regarded as isolated acts. The issue of the convertible certificates and their sale, the retirement of the preferred stock with the proceeds, the retirement in turn of the certificates themselves, and the issue of an equal amount of common stock of the company constituted in a larger sense but steps to one ultimate act, and that act was the conversion of the preferred stock into the common stock of the company. Every conversion of a security of one class into a security of another necessarily implies a retirement of the former, although every retirement does not necessarily signify a conversion. The issue of the convertible certificates was but a temporary expedient in the process of conversion. Having served their temporary purpose, they passed out of existence, and no longer remained as obligations of the company. As the company was clothed with the express power to convert its preferred stock into stock of another character, and the conversion as effected had due regard to the rights of all parties, an extended consideration of some intermediate but nonessential step becomes profitless. It is true that the preferred stockholders were not accorded the privilege of subscribing to the new issue of common stock; but certainly that fact is not a proper subject for complaint on the part of appellant. His holdings were confined to 100 shares of common stock. He is not the protector or conservator of the personal rights of the preferred stockholders. The claim that their rights were denied may well be left to them to be asserted. As a common stockholder, the appellant was accorded every consideration which he could lawfully claim. He was entitled to subscribe for the new common stock to an amount proportionate to his holdings of the former issue—the same right that was given to every common stockholder. He was not required to exercise such right if he did not so desire, and, if he thought the amount allotted to him for subscription was excessive, he was entitled to reduce it to an amount measured by his sense of the equities of the situation. One may not invoke the aid of the courts in respect of matters in which he has neither a personal nor a representative interest. *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. 674, 36 L. Ed. 521. Moreover, it may well be said that each preferred stockholder acquired his stock subject to the terms of an express contract which denied him the right to share in the new stock assigned for subscription, and that, when his stock was retired, he thereupon became a stranger to the company, without voice

or right of participation in its intracorporate acts and relations. It is also contended by appellant that the retirement of the preferred stock was intended to further the accomplishment of an unlawful merger in the name of the securities company; that without the elimination of the preferred stock the holders of a majority of all the stock of the Northern Pacific, preferred and common, were opposed to the merger; and that, therefore, the taint of the ultimate purpose affected the legality of the retirement. Waiving the question which at once suggests itself—whether it is permitted to inquire into the motives which prompt the doing of that which in itself is expressly authorized by law—we find nothing in the record which supports the premises from which the conclusion is drawn. The evidence conclusively shows that the purpose to retire the preferred stock at the earliest practicable opportunity had its birth when the stock was first issued in 1896. That opportunity arose when the market value of the common stock reached par. Were the preferred stock wholly replaced in the capitalization of the company by an equal amount of common stock, the great advantage to the holders of the original issue of common stock, to whom the option of retirement belonged, is at once apparent. The provision for a preferential dividend on nearly one-half of the total issue of stock would no longer exist, and the surplus net earnings in each fiscal year would then be ratably divided among all of the stockholders of the company. All of the testimony appearing in the record is to the effect that the conversion of the stock was planned and executed upon its own merits, and had no bearing upon the transaction with the securities company. It also appears that before the conversion was consummated the contending elements among the stockholders who were struggling for the control of the company adjusted their differences, and that subsequently practically all of the stock of the defendant was sold to the securities company, or exchanged for stock of that company. If we may, without direct evidence, assume with counsel that this harmony was due in part to a recognition of the power of the holders of a majority of the common stock to force the retirement of the preferred, nevertheless the fact so assumed is entirely too remote for consideration in connection with the contention of the appellant.

The remaining contention of appellant, necessary to be considered, is that the Circuit Court erred in holding that the securities company was an indispensable party to the suit, and that in its absence the intervening petition could not be maintained. The theory of the appellant is that, as an individual stockholder, he can maintain a suit against his corporation as sole defendant to prevent it from commencing or continuing the doing of those things which are beyond its corporate powers, are in violation of law, and which may lead to a forfeiture of its corporate franchises; that, in respect of the charges made in his intervening petition and the relief sought thereby, the defendant company may stand as the sole representative in the suit of all of the stockholders, including the securities company, and that, therefore, the presence of the latter may be dispensed with. But appellant ignores the force of the

pressing and insistent fact that the very thing of which he complains is primarily the ownership by the securities company of a majority of the stock of the defendant, and the end which he is seeking is the destruction of its title and its status as a stockholder. It is of the foundation of our jurisprudence that the rights of a person shall not be directly affected by a judicial proceeding to which he is not a party, and in which he cannot be heard for their defense and protection. Out of this principle has grown the rule, always recognized and enforced, that a suit will not be entertained in the absence of a person who has an interest in the controversy of such a nature that a final decree cannot be rendered without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Minnesota v. Northern Securities Company*, 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; *New Orleans Waterworks v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; *California v. Southern Pacific Company*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; *Christian v. Railroad*, 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589; *Ribon v. Railroad Companies*, 16 Wall. 446, 21 L. Ed. 367; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Taylor v. Southern Pacific Company (C. C.)* 122 Fed. 147; *Hollifield v. Railroad Company*, 99 Ga. 365, 27 S. E. 715; *Joslyn v. St. Paul Distilling Company*, 44 Minn. 184, 46 N. W. 337. *Taylor v. Southern Pacific Company*, *Hollifield v. Railroad Company*, *supra*, and the case at bar, are identical in important and controlling features. In each case the complainant was a minority stockholder of the defendant corporation, and in each case the complainant undertook to lay the ax at the root of the title of an absent stockholder. In the two cases cited it was held that the presence of a stockholder whose rights were attacked was indispensable to the accomplishment of the complainant's purpose.

It is true that, generally speaking, a corporation is the proper representative of all of its stockholders in a suit in which the relief sought will affect each and all of them in the same way and to the same degree. In one sense all of the stockholders are the corporation, and the corporate body, as a legal entity, may be intrusted with the defense of those rights which are common to all. Obviously, the very foundation of this rule is a community of interest, with respect of the object of the suit, between the corporation and all of its stockholders. But where the gravamen of the complaint consists of a vital conflict of interest between the corporation and one or more of its stockholders, or between different stockholders or classes of stockholders, the reason for the rule concerning the representative character of the corporation ceases. The underlying theory of appellant's case is that the corporate powers of the Northern Pacific which he is seeking to protect and the claims of the securities company are conflicting to such a degree that the continued assertion and recognition of the latter will destroy the existence of the former. In other words, he says that, if the securities company is permitted to dominate and control the Northern Pacific in connection with a similar relation to the Great North-

ern, the independence of the Northern Pacific will cease, its capacity to perform its duties to the public will be destroyed, and ultimately its corporate franchises may be annulled. A greater conflict between opposing interests can scarcely be imagined, and in view of such a conflict it cannot reasonably be said that in the suit before us the Northern Pacific may stand as the accredited representative of the securities company.

We may agree with counsel that there are involved in this suit questions concerning the corporate functions of the Northern Pacific, and also conditions which threaten its corporate integrity. But all of this would merely show that the Northern Pacific was an indispensable party to the controversy. It would not tend to show that some other corporation did not also possess such an interest in some other phase of the controversy as made its presence equally indispensable. The power of another to hold and own stock of the Northern Pacific and to exercise the rights of a stockholder are not corporate functions of that company. But the question whether the securities company may lawfully continue to own the stock of the Northern Pacific which it held when the appellant intervened, and may lawfully continue to exercise the rights incident to such ownership, is one affecting the corporate powers of the securities company. It is a question in which that company has an immediate and vital interest. The force of these observations is apparent when it is remembered that appellant is seeking a decree that the transfer to the securities company of a controlling interest in the stock of the Northern Pacific be adjudged fraudulent, illegal, and void, and that the organization of the securities company be held to be an illegal conspiracy, and, in substance, that the Northern Pacific and its officers be enjoined from according to the securities company the rights and privileges of a stockholder. We are of the opinion that the securities company was an indispensable party to the controversy, and that the Circuit Court correctly held that the suit could not be maintained in its absence. These conclusions make it unnecessary to consider the other matters presented in the briefs of counsel.

The decree of the Circuit Court will be affirmed.

(129 Fed. 312.)

BLACK HILLS & N. W. RY. CO. et al. v. TACOMA MILL CO.

(Circuit Court of Appeals, Ninth Circuit. March 4, 1904.)

No. 988.

1. INJUNCTION—ADEQUATE REMEDY AT LAW—CONDEMNATION PROCEEDINGS.

An injunction will not be granted to restrain proceedings by a railroad company to condemn land for right of way in Washington on the ground that it is not for a public use, since, under the statutes of the state, as construed by its Supreme Court, that question may be litigated in the condemnation proceedings.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

This is a suit in equity brought by the appellee to restrain the appellants from proceeding with a certain condemnation suit for the appropriation of

lands of the appellee. Affidavits were filed in support of the bill, and counter affidavits in opposition to the application for a temporary injunction. At the hearing an interlocutory decree was entered, granting the injunction prayed for. The case is now before this court on appeal from the interlocutory decree.

Considering the events connected with this suit in chronological order, it appears that the Black Hills & Northwestern Railway Company, appellant herein, petitioned the superior court of Washington for the condemnation of a right of way across certain lands belonging to the Tacoma Mill Company, appellee herein, alleging that the petitioner was a corporation organized under the laws of Washington, and engaged in the construction of a line of railroad in the state of Washington for the carriage of freight and passengers; that the defendant Tacoma Mill Company was a California corporation engaged in operating a sawmill for the manufacture of lumber in the state of Washington, and is the owner of certain lands in Thurston county, in said state; that the petitioner has constructed and has ready for operation a line of railroad which has for point of commencement and intersecting with the Olympia & Gray's Harbor Branch of the Northern Pacific Railway, a point one mile west of the town of Little Rock, in Thurston county, Wash., and extends to a certain point in said county adjacent to lands owned by the defendant; that the petitioner has projected its said line of railroad from said point over the defendant's lands to a terminus on the Pacific Ocean in said state; that the petitioner has sought the right of way from defendant by purchase, but that defendant has refused to permit petitioner to enter thereon, or to construct said railroad thereon, or to sell or convey such right of way to petitioner. The petitioner prayed that condemnation proceedings be instituted for the appropriation of the defendant's lands to the extent of a right of way for said projected railroad, under a statute of Washington permitting the appropriation of private property by corporations when the public interest demands, and when the purpose is a public use. Upon motion of the appellee, the proceeding was removed to the United States Circuit Court for the District of Washington. Before a hearing was had on the petition, the appellee brought suit in equity to restrain the condemnation proceeding, alleging as grounds for the relief prayed for that the defendants Thomas Bordeaux, A. H. Anderson, and Joseph Bordeaux owned all the capital stock of the appellant Mason County Logging Company, which company was organized to carry on a general sawmill and logging business, and is not authorized to act as a common carrier, nor to exercise the right of eminent domain; that said company owns large tracts of timber land adjacent to the lands of the appellee, and has been engaged in hauling the logs cut from its said lands over its logging road to the Northern Pacific Railway, and thence to tide water under a special freight rate; that said Thomas Bordeaux, A. H. Anderson, and Joseph Bordeaux organized the defendant Black Hills & Northwestern Railway Company as a common carrier of freight and passengers, and with the power to exercise the right of eminent domain, with the sole design of extending the logging road of the Mason County Logging Company to the lands of said company lying beyond the lands of the appellee, so as to enable it to haul the timber therefrom at reduced freight rates; that the right of way attempted to be condemned is sought for the sole purpose of constructing such a logging road for the timber of the appellant logging company; and that it was never intended that the appellant railway company should exercise any of the functions of a common carrier. It is alleged that no line of railway has ever been projected by the appellant railway company, except across the lands of the appellee; that, if such a railroad should be constructed, it could be used for no useful purpose, save to transport the logs of the said logging company; and that the public interest does not require the prosecution of such an enterprise, nor is the same a public use. The bill charges that the appellant railway company was fraudulently incorporated for the purpose of unlawfully, by a fraudulent compliance with the laws of the state relating to the exercise of eminent domain, securing ingress and egress to and from the timber lands of the said logging company. In support of this bill, affidavits were filed by the appellee alleging that the said logging company had endeavored to negotiate with the appellee for a right of way for a logging road across the lands of the appellee, and upon the refusal to grant that privilege the appellant

Thomas Bordeaux had stated that the logging company would incorporate a railroad company and force a right of way. It is also alleged in the affidavits that the country through which the line of road is projected beyond the lands of the appellee is impracticable for the successful operation of a railroad.

This showing is met by the appellants by affidavits showing that the logging company has been engaged in the logging business in the district in question for four years, and has constructed some six miles of standard gauge main line railroad, and four miles of side tracks and switches, over which it hauled its logs to the Northern Pacific Railroad; that the town of Mumby has been built upon the said line of road, with about 15 families resident there, and 8 or 10 families in the vicinity; that there are a public school, a post office, and a sawmill at said town; that said logging company, while not authorized or desiring to do business as a common carrier, had for some time been obliged, from the necessities of the situation, to carry both freight and passengers over its road. It was alleged that the projected line of road had long been contemplated; that it would be constructed with ordinary grades, and would open up a country rich in timber land, and which, when logged off, would be valuable for agricultural purposes; that said road would furnish an outlet from said district to Puget Sound, on one side, and to Gray's Harbor, on the other. The allegations of fraudulent incorporation are declared to be untrue.

Upon this showing, the court below entered an interlocutory decree restraining the appellants from proceeding with the condemnation suit.

Charles F. Munday, George C. Israel, and James B. Howe, for appellants.

Struve, Hughes & McMicken, W. T. Dovell, and James M. Ashton, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The appeal is from the order of the court granting the preliminary injunction, and the errors specified are that neither the bill, nor the affidavits filed in support of the bill, state any ground of jurisdiction in a court of equity, for the reason that it appears therefrom that complainant cannot suffer any injury or damage whatsoever by the prosecution of the condemnation proceedings; that the bill, and affidavits filed in support thereof, show that complainant has a plain, adequate, and complete remedy at law, namely, its defense to the condemnation proceedings, wherein all of the questions sought to be raised by complainant in the present suit can be raised and adjudicated.

It is provided in the statutes of the state of Washington that any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way, or any other corporate purposes, may present to the superior court of the county in which any land, real estate, premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth certain particulars concerning the ownership of the property, and the object for which the land is sought to be appropriated. The statute requires that a notice, stating briefly the objects of the petition, and containing a description of the land, real estate, premises, or property sought to be appropriated, and stating the time and

place when and where the same will be presented to the court, or judge thereof, shall be served on each and every person named therein as owner, incumbrancer, tenant, or otherwise interested therein, at least 10 days previous to the time designated in such notice for the presentation of such petition.

It is further provided that at the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition have been duly served with notice, and shall be further satisfied by competent proof, among other things, that the contemplated use for which the real estate, premises, or other property sought to be appropriated is really a public use, that the public interests require the prosecution of such enterprise, and that the land, real estate, premises, or other property sought to be appropriated are required and necessary for the purpose of such enterprise, the court or judge thereof may make an order directing the sheriff to summon a jury to ascertain, determine, and award the amount of damages to be paid to the owner or owners, and to all tenants, incumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property. 2 Ballinger's Ann. Codes & St. Wash. §§ 5637, 5638, 5640, 5641. From these provisions of the statute, it appears that, before there can be an ascertainment of the value of the land sought to be appropriated by the petitioner as a right of way, all parties interested in the property described in the petition have the right to have the court determine in the condemnation proceedings the question whether the contemplated use for which the property is sought to be appropriated is really a public use, and not a private use, whether the public interest requires the prosecution of the enterprise, and whether the land sought to be appropriated is necessary for the purposes of such enterprise.

But it is contended by the appellee in support of the interlocutory decree of the court below that the petitioner, the Black Hills & Northwestern Railway Company, is not acting in good faith, within the purview of the statute granting to corporations the right to exercise the power of eminent domain, and that this question cannot be litigated in the condemnation proceedings; that the inquiry which the court is authorized to make is limited by the apparent authority conferred upon the corporation by the statute; that, in this case, behind the apparent authority conferred by the articles of incorporation is a question of fraud in the organization of the corporation, whereby its promoters have unlawfully colluded to place themselves, as a corporation, in a position whereby they are able to impose upon the court, and appropriate the property of the complainant for a private use.

If the facts charged in the bill of complaint are true, concerning the fraudulent character of the incorporation of the Black Hills & Northwestern Railway Company, there is, without doubt, a remedy by information in the nature of quo warranto to dissolve the corporation. Section 5780 et seq., Ballinger's Ann. Codes & St. Wash.

In *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755, an injunction had been granted restraining the construction of a rail-

road by the complainants across the lands of the defendants, and from instituting condemnation proceedings for the taking of land for such purpose. It was contended by the defendants, upon the writ of error to the appellate court, that the complainants, in incorporating, were the mere agents of a storage company, using its money for stock subscriptions, and that the road was designed for the sole convenience of the storage company; no public use or necessity being involved in the proposed appropriation of land. The situation was very similar, it will be observed, to that in the case under consideration. The court there said:

"These reasons, if they have any force, go directly to the legality of the organization of the railway company. If they should prevent the exercise by the company of the powers which the general railroad law confers upon corporations created under it, it is because the company should not have been created in the mode and for the purposes in and for which it has been organized, and should be disbanded. It is not denied that every formal requirement of that law has been complied with, and that, to all external appearance, this company is a corporation by virtue of its provisions; but it is claimed that, the motives and purposes of its corporators being what they are, they have usurped a corporate existence which the law did not authorize them to assume, and hence, while they may retain the form, they cannot exercise the functions, of a corporation. Not because this corporation threatens to assail any rights of the complainants, which, if lawfully organized, it would not be permitted to invade, but because it is a corporation de facto, merely, and not de jure, does the chancellor prevent it from doing what only a legal corporation may do. An inquiry and judgment of this nature are, we think, beyond the powers of the court of chancery, at least in a suit between private parties. Whenever it is sought to impugn the legality of a corporation which exists under the forms of law, the remedy is by quo warranto, or information in the nature thereof, instituted by the Attorney General."

The court, after considering other matters presented by the bill of complaint, said:

"Most of these questions are questions of law, which certainly have not been heretofore settled in the complainants' favor; and no rule of equity is more firmly established than the doctrine that a complainant is not in a position to ask for a preliminary injunction, when the right on which he founds his claim is, as a matter of law, unsettled."

The court accordingly dissolved the injunction. See, also, *Holly Shelter R. Co. v. Newton* (N. C.) 45 S. E. 549.

But in our opinion there is also a remedy provided by the statute, in the defenses that may be made to the condemnation proceeding. The wrong which it is charged the petitioner is about to accomplish by the proceeding is the taking of complainant's property for a private use, and this wrong is specifically made a defense by the statute; and, when made, it raises a question which the court is required to determine in limine upon satisfactory proof, and not merely upon the showing that the petitioner is a corporation authorized by law to exercise the right of eminent domain. This is clearly the view of the law entertained by the Supreme Court of Washington.

In *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, the Supreme Court had before it a judgment in a proceeding brought to condemn a right of way across certain land. The points urged by the appellant were, that the land sought to be condemned was attempted to be appropriated for a private, and not a public, use,

and that the respondent was not authorized by its charter to condemn said right of way or exercise the right of eminent domain for the uses set forth in the petition. It was objected by the respondent that the appeal could not be entertained, for the reason that the statutory provision for an appeal in condemnation proceedings was limited to an appeal from the amount of damages. The Supreme Court sustained this objection, and, in the course of its opinion, said:

"It is argued by the respondent that, inasmuch as the law makes the question of public use a judicial question, it must be contemplated that that judicial question is to be settled by the appellate court; but we do not see any particular merit in this contention, for questions which the law submits to the exclusive jurisdiction of the superior courts may be as purely judicial questions as though they were tried in this court."

The Constitution of the state of Washington provides, in article 1, § 16, that:

"Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

In article 4, § 4, the Constitution gives the Supreme Court of the state power to issue all writs necessary to the complete exercise of its appellate and revisory jurisdiction.

In *Seattle & Montana R. R. Co. v. Bellingham Bay & Eastern R. R. Co.*, 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907, the superior court had determined that the right of way described in the petition and sought to be appropriated was necessary for the petitioning railroad company, and the intended use was a public one, and that the public interest required the appropriation. The proceeding was taken to the Supreme Court by certiorari. The Supreme Court held that, under the provisions of the Constitution cited, it had the power to issue the writ of certiorari to bring before it the proceedings of the superior court for the purpose of reviewing the determination of that court upon the question whether the contemplated use of the property sought to be condemned was really a public use. The court thereupon reviewed the proceedings for that purpose, and held that competent proof had been made of all the facts necessary to be proved, and affirmed the judgment of the superior court. This decision is, in effect, a determination that the question whether the property sought to be appropriated was for a public use, and the necessity for that use, could be litigated in the condemnation proceeding. To the same effect is *State ex rel. Smith v. Superior Court*, 30 Wash. 219, 70 Pac. 484, and *State v. Superior Court of King County* (Wash.) 72 Pac. 89.

The good faith of the appellant in the prosecution of the condemnation proceeding is necessarily involved in the question whether the land sought to be appropriated is really for a public use, and, as this question may be litigated in the condemnation proceeding, the complainant has a plain, adequate, and complete remedy at law. The rule under such circumstances is stated in *Lewis on Eminent Domain* (2d Ed.) vol. 2, § 646, as follows:

"A bill in equity will not lie to enjoin proceedings for condemnation, for the reason that the mere taking of such proceedings does no injury to prop-

erty, and for the further reason that the grounds relied upon for an injunction may be urged in defense of the proceedings. The making of a public improvement cannot be enjoined on the ground that it is unnecessary or is being made to further private ends, but, where the ground relied upon cannot be litigated in the condemnation proceedings, an injunction will be granted."

The decree of the Circuit Court is reversed, with direction to dismiss the bill.

(129 Fed. 318.)

SWAN v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1904.)

No. 1,006.

1. TELEGRAPHS—MESSAGES—TRANSMISSION—DELAY—NOTIFICATION TO SENDER—NEGLIGENCE.

Where a mining expert delivered a telegram to defendant telegraph company advising the purchase of certain mining stock, which message he directed to be transmitted to plaintiff and 293 others, who were his clients, under an agreement to transmit the same at once, there being other methods of rapid communication between the sending office and plaintiff's place of business, it was the duty of the telegraph company, on discovering that it would not be able to transmit such message to plaintiff without delay, by reason of a defect in its wires, to promptly notify the sender of such fact, he being a person well known to the company's agents at the sending office, and easily accessible.

2. SAME—DAMAGES.

Where a mining expert delivered a message to a telegraph company to be sent to plaintiff, his client, advising the purchase of certain mining stock, which defendant agreed to promptly transmit, but failed to notify either the sender or the addressee that there had been several hours' delay, by reason of which the addressee was led to purchase the stock at a higher price than he would have been compelled to pay if the message had been promptly delivered before the close of an exchange on the day it was sent, the addressee was entitled to recover the difference between what he had to pay for the stock which he purchased the succeeding day and what the stock would have cost him if the telegram had been transmitted within a reasonable time after it was received for transmission.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Henry L. Clarke, for plaintiff in error.

P. B. Eckhart, for defendant in error.

Before GROSSCUP and BAKER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This action was brought by Charles J. Swan, the plaintiff in error, against the Western Union Telegraph Company, to recover damages for losses sustained on account of the failure of the defendant company to give notice of the delay in sending an important business telegram relating to the purchase of certain mining stock on

¶ 1. Delay in delivery of telegram, failure to disclose that line was not in working order, see note to Pacific Postal Telegraph Cable Co. v. Fleischer, 14 C. C. A. 177.

¶ 2. Measure of damages in actions against telegraph companies, see notes to Western Union Telegraph Co. v. Coggin, 15 C. C. A. 235; Same v. Morris, 28 C. C. A. 59.

See Telegraphs and Telephones, vol. 45, Cent. Dig. § 72.

the Boston Stock Exchange. A jury was waived, and the case tried by the court upon the following stipulation of facts, to wit:

"It is hereby stipulated and agreed by and between the parties herein, by their respective attorneys, that:

"The plaintiff makes no claim against the defendant on account of negligent delay in transmitting and delivering the message in controversy, and said question may be considered by the court as eliminated from the case; but the plaintiff charges the defendant with negligently failing to give due notice of delay of the message, or by reason of the '3 27 PM' under the sender's signature, with wrongfully misleading the plaintiff as to such delay, as set forth and charged in the declaration. On May 1, 1901, and for some time theretofore and thereafter, the defendant corporation was engaged in and operating a public telegraphing business and service for compensation between and within Chicago, Illinois, and Houghton, Michigan. On said 1st day of May, 1901, one Horace J. Stevens, a mining expert, and editor of certain copper-mining publications, and assistant commissioner of mineral statistics for the state of Michigan, occupied an office in the said town of Houghton, and was well known to the local office of the defendant at Houghton. On the said 1st day of May, 1901, at about 9:15 a. m., the defendant, at its public office in Houghton, Michigan, received from said Horace J. Stevens, of Houghton, Michigan, a communication to be telegraphically transmitted and delivered to the plaintiff herein in words and figures as follows:

"Houghton, Michigan, May 1, 1901.

"Dr. C. Joseph Swan,

"34 Washington St., Chicago.

"Ten to twenty dollars quick rise in Mohawk. Has Wolverine lode rich as Quincy beside million dollars worth "Mohawkit" almost spot cash opened in three upper levels. Advise quick purchase.

"Horace J. Stevens.

"And about four o'clock in the afternoon of the said 1st day of May, 1901, the defendant delivered to the plaintiff, and he paid the charges on, a typewritten message in words and figures as follows:

"253. CH. MD. JO. 31 Collect,

"Houghton, Michigan, May 1, 1901.

"Dr. C. Joseph Swan,

"34 Washn St Chgo,

"Ten to twenty dollars quick rise in Mohawk. Has Wolverine lode rich as Quincy beside million dollars worth "Mohawkit" almost spot cash opened in three upper levels advise quick purchase.

"Horace J. Stevens.

"3 27 PM"

"The plaintiff had no notice that the message accepted as aforesaid by the Houghton office of the defendant would be or had been delayed in the transmission and delivery beyond the time ordinarily required for the transmission and delivery of such a message or for more than one-half hour after its acceptance by the defendant. The message first above quoted was accepted by the defendant from the said Stevens in manner and form as follows, viz.: The entire message, except the name and address of the sendee, was written by Stevens on one sheet of paper, and on a number of other sheets were written the names and addresses of 294 sendees, including the plaintiff. When the said message and lists of sendees were presented by Stevens at the Houghton office of the defendant a consultation was had between Stevens and the manager of the said office as to the most expeditious and convenient method of transmitting the message; and at the suggestion of the said manager it was arranged that the body of the message should be wired to Chicago and followed by the list of addresses for Chicago and points beyond, the Chicago office to relay the message to such further points. Thereupon the sheets of addresses were rearranged by Stevens, and numbered in red pencil, and the sheet bearing the plaintiff's name and address became the first sheet, with the plaintiff's name number 17 on the list, and preceded by 13 addresses for Chicago and points beyond and 3 'local' addresses. The said manager of the defendant advised Stevens that the transmission of the matter so accepted would

be promptly proceeded with, and the said Stevens had no notice that the message to the plaintiff would be delayed beyond the time that would ordinarily be required for the transmission and delivery of such a message so accepted.

"On the said 1st day of May, 1901, there were, besides the service of the defendant, two other available means of rapid communication from Houghton, Michigan, to Chicago, Illinois, viz., the service of the Postal Telegraph Co. and the long-distance telephone, the latter directly connecting with the office of the plaintiff. From the opening up to the hour of noon on the Boston Stock Exchange on the said 1st day of May many hundred shares of Mohawk stock sold at 39, and on said day until the noon hour there was not more than $\frac{1}{4}$ of one point of fluctuation from 39 in the sales of said stock. Thereafter the said stock rose, and the last sales before the close of said exchange at 3 p. m. of the said day were at 47, and the following morning the market opened at 51. The plaintiff could have communicated by telephone with his brokers in Chicago, Wm. H. Colvin & Co., at any time on the said 1st day of May, and the said brokers then had such security for the plaintiff's orders that they would at once have proceeded to execute by telegraph his telephone order to buy one hundred shares of Mohawk on the Boston Exchange. The plaintiff would testify that he inferred that the message delivered to him as aforesaid had been transmitted within the time ordinarily required for such a message, and had been sent by the said Stevens after the close of the Boston Stock Exchange, whereon Mohawk was listed, on the said 1st day of May, and that such message applied to the market of the following or 2d day of May, 1901. The plaintiff would testify that he further inferred and understood, and was not informed to the contrary, that the hour date of '3 27 PM' appearing directly under the signature of the said Stevens on the said message indicated the hour at which the said message had been delivered by the said Stevens to the defendant. On the morning of the 2d day of May, 1901, about 10:30 a. m. (Central time), the aforesaid brokers of the plaintiff, at his order to buy 'under 50,' bought for him on the Boston Exchange one hundred shares of Mohawk at 49 $\frac{1}{2}$, which was as high as any subsequent sale of that day, and several points below a few earlier sales of the same morning; and he would testify that he ordered such purchase about 10 a. m. on the ground of the advices contained in the aforesaid message, and upon his aforesaid inferences and understanding as to the time of sending of said message. Later on the said 2d day of May and on the next following day Mohawk fell, and on the 3d day of May, 1901, closed at 42, and thereupon the plaintiff made inquiry of the said Stevens by long-distance telephone as to the reason for such fall, and then and there for the first time it became known to the plaintiff and to the said Stevens that the above-stated delay of the message of Stevens had occurred. Thereupon the plaintiff made inquiry on the said 3d day of May, 1901, at the Chicago office of the defendant, as to the cause of the aforesaid delay and the Chicago office wired the inquiry to the Houghton office, and the latter wired back that 'wire trouble' had 'delayed (Houghton) business all around (on May 1, 1901)'; and the said Chicago office referred the plaintiff to the New York office of the defendant as to any claim for damages, and such claim was forthwith made in writing by the plaintiff, and from time to time repeated until the beginning of the present suit. The plaintiff would testify that the one hundred shares of Mohawk purchased as aforesaid were held by him until the autumn of 1901, and finally sold at 49, and while so held their value at one time decreased to about 30, and at another time the plaintiff was called upon to pay and did pay an assessment of three hundred dollars on the said shares; and he also paid to his brokers one-eighth of one point per share for buying and one-eighth of one point per share for selling said one hundred shares; and while so holding said shares he was deprived of all interest that might have accrued from the moneys so invested.

"This suit was not brought until after the refusal of the defendant to settle the aforesaid claims of the plaintiff. And the foregoing statement of facts shall constitute all and the only evidence to be submitted by either party on the trial of this cause.

"Chicago, June 30th, 1902.

C. Joseph Swan,

"By Henry Love Clarke, His Attorney.

"Western Union Telegraph Co.,

"By Henry D. Estabrook, Its Attorney."

The court below, upon the hearing, after overruling several proper special requests to find for the plaintiff, rendered judgment in favor of the defendant. We think this was error, and that judgment should have been given in favor of the plaintiff for \$1,050 and interest, that being the amount of damages sustained by him by reason of the defendant's neglect in not giving notice of the obstruction in its telegraph lines between Houghton and Chicago; the stipulation showing that at the first opportunity after the receipt of the message he paid \$49.50 per share for 100 shares which would have cost him \$39 per share if the message had been sent in due course of business on the morning of May 1st, within a reasonable time after its receipt at the defendant's office in Houghton. It seems evident that the duty was with the defendant company to send the message in due course, or, if it was unable from obstruction of its lines to do so, then to notify the sender of that fact so that he might avail himself of one of the two other methods of quick communication that were open to him. It does not appear from the statement of facts whether the obstruction in the lines existed at 9:15 a. m. of May 1st, the hour when the message was handed in at the Houghton office, or came in after that time. If we were to indulge in any presumption from the facts that are in evidence, it would seem reasonable to suppose that the inability existed at the time of receiving the message, when, according to the stipulation of facts, the company's manager advised Mr. Stevens that the transmission of the message would be promptly proceeded with. Thirty minutes would probably have given ample time for transmitting the message if proceeded with according to such promise, but it was not sent until nearly seven hours after its receipt. So that, if the lines were not down at the receipt of the message, they were but shortly after; otherwise the message would have been sent. But that question does not seem to be material, as the obligation resting upon defendant would be of a similar character in either case. If the lines were already down, it was the duty of the defendant to so inform the sender, so that he could avail himself of another line of communication, or, if he so chose, to take the chances on the defendant's restoring its service in time. If communication was obstructed after the message was received, this fact being unknown to Mr. Stevens, it was equally incumbent upon the defendant to give him timely notice of that fact. Without any explanation or excuse for the delay in sending the message from 9:15 in the morning to 4 o'clock in the afternoon, or of notifying the sender of the disability to send, the inference of culpable neglect is palpable; and, to aggravate the case, the company at some point, whether at Houghton or Chicago does not appear, placed under the sender's name the figures "3 27 PM," from which the plaintiff understood that the message was received by the company at Houghton at that time, which would have given the very reasonable time of 33 minutes for its transmission from the Houghton office to Chicago. But under the stipulation we are not at liberty to lay any stress upon this circumstance. There is nothing in the case to show what these figures placed under the sender's name import—whether they are to note the time of the receipt of the message at Houghton, the time of sending, or the time of its receipt at the office in Chicago. It was open to the plaintiff to make inquiry, if he did not know what

the figures meant. There is no evidence that he did so. He assumed that the figures noted the time the message was received by the company at its office in Houghton. These figures placed by the company under the sender's name are relied upon by the plaintiff as one ground of negligence, but we place the decision of the case solely on the ground of the negligence of the defendant in failing to give notice that its lines were obstructed so that the message could not be sent. Whether the obstruction in the lines existed when the message was delivered, or occurred after that time, it was equally incumbent upon the company to notify the sender of the fact, so that he could send the message by another line of communication. That the defendant's line was out of order was a fact unknown to the sender, but must have been well known to the defendant. Under these circumstances it was the plain duty of the defendant to give timely notice of its inability to send the message.

We have assumed thus far that there was delay due to wire trouble as stated by the Houghton office. Counsel for appellee, however, insist that, though there is thus a showing of delay, there is no showing that the delay was unreasonable, or that the Houghton office had such knowledge concerning the delay as imposed upon it the duty to inform the parties interested that the message had been delayed; and in support of this insistence point to the opening paragraph of the stipulation that "the plaintiff makes no claim against the defendant on account of negligent delay in transmitting and delivering the message in controversy, and said claim may be considered by the court as eliminated from the case." While such paragraph exempts appellee from damages in this suit on account of negligent delay in transmitting the message, it works no exemption from damages growing out of the negligent failure to give notice of the delay; for appellee is expressly charged in the stipulation with negligently failing to give due notice of the delay. The two grounds of action thus indicated—the one eliminated and the other clung to—are distinct. It is with respect, then, to the second ground, only, that the fact of delay cuts any figure. The stipulation shows the fact of delay; but leaves it open whether the cause and nature of the delay were such that the agent should have given notice to the parties interested; and on this open question of fact, the evidence of which was wholly within the possession of appellee, the burden of proof, in our opinion, was on the appellee.

Our view may be summed up thus: The suit being for damages growing out of the agent's failure to give notice of the delay, and the bare fact of delay appearing in the stipulation, the burden was on appellee to show the nature and cause of the delay; and, in the absence of such showing it will be presumed that the agent at Houghton had such information as imposed on him the duty of informing the parties interested—a duty that was not in fact performed. The case is not distinguishable in principle from *Fleischner v. Pacific Postal Telegraph Cable Co.* (C. C.) 55 Fed. 738, affirmed by the Circuit Court of Appeals for the Ninth Circuit, 66 Fed. 809, 14 C. C. A. 166. The general rule applicable in that case was laid down by that court as follows:

"As has been said, plaintiff in error contracted to transmit and deliver this message. At the time its wires were down, and there was an impossibility in performing the contract as required. The general rule is that, when an

impossibility of performance is known to the promisor, but is not known to the promisee, the former is liable in damages for failure to perform. 3 Am. & Eng. Enc. Law, subd. 73, p. 898, tit. 'Contract'; 2 Parsons, Cont. 673."

The analogous rule more specifically adapted to telegraph companies is laid down by Gray in his work entitled "Communication by Telegraph" (section 18), as follows:

"If a telegraph company is unable, through a disarrangement of its lines or other cause, to do what it makes a business of doing, it must inform those who wish to employ it of the fact, and thus acquaint them with the advantage of employing other means. A telegraph company offers and is employed solely to effect the rapid communication of a message. The excuse for a failure to effect that communication that the company, when it made the contract, knew that it could not perform it, can hardly be deemed a valid one."

That rule, as there laid down, commended itself to the United States Circuit Court of Appeals in the case afore cited, and commends itself to this court as applicable to the case in hand.

It appears from the agreed facts that the plaintiff was one of 294 persons to whom this same message was to be sent. A list of these persons was prepared, with the plaintiff's name standing as No. 17 in the list, preceded by 13 other addressees for Chicago and beyond and 3 local addressees. There was to be but one dispatch for these 294 customers, so that the profits, considering the amount of work to be done, would no doubt be considerable. It does not appear whether or not this circumstance had any influence upon the conduct of the company in retaining the dispatch for so many hours without giving notice to Mr. Stevens, who had an office in Houghton, was a public character, and well known to the local office of the defendant at Houghton, that an obstruction in the wires rendered it impossible to transmit the message. But whether the inducements for retaining and sending the message, rather than having another company do it, were great or small, the defendant had a duty to perform. Although not a common carrier in the sense of being insurers, a telegraph company owes an obligation to the public analogous to that of a common carrier.

On the question of damages we have encountered no such difficulty as seems to have been experienced by the court below in finding a proper measure of damages for the case. If the plaintiff was entitled to recover even nominal damages, that would be better than to give a judgment for costs against him. The proper measure of damages is what the plaintiff lost through the negligence of the defendant, which was the difference between what he had to pay for the stock on the morning of May 2d and what it would have cost him in the forenoon of May 1st, when he should have received the dispatch, or notice that it could not be sent.

The judgment of the court below is reversed, and judgment ordered in favor of the plaintiff in error for the sum of \$1,050, with interest from the 2d day of May, 1901, besides costs.

(127 Fed. 914.)

WOODS v. MCGRAW et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1904.)

No. 498.

1. VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—OPTION TO PURCHASE.

Defendant, who had sold land to plaintiff, and taken a trust deed securing purchase money, on default caused the land to be sold under a power of sale therein. The place of sale was remote from railroad and telegraph, and the attorney and agent of plaintiff, who resided there, having received no instructions from him, sought to delay the sale by making objections to its regularity, the result being an agreement by which the objections were withdrawn, the land was sold, and bid in by defendant for the amount of the debt, and he gave the agent a paper signed by him, by which he agreed that plaintiff "may have 10 days in which to repay me the purchase money of land and \$250 in full of costs, etc., and on payment of which I will resell land to him or cancel this sale." Neither the attorney nor agent of plaintiff had authority to bind him by any contract. *Held*, that the instrument merely gave him an option to repurchase the land, and did not operate as an extension of time for him to redeem from the mortgage, or continue his indebtedness thereunder.

2. SAME—SPECIFIC ENFORCEMENT OF OPTION CONTRACT—TIME LIMIT.

It being shown that defendant was in urgent need of money, and that the time fixed in the option was determined only after negotiation, and was longer than he desired, such time must be held of the essence of the contract, and a court of equity is not authorized to extend it by enforcing specific performance after the time has expired without any offer of performance by plaintiff.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

L. L. Lewis and Frank W. Christian (D. Harman, Robert A. Watson, Christian & Christian, and Lewis & Cary, on briefs), for appellant.

W. G. Mathews and C. W. Campbell (Melville D. Post, G. H. A. Kunst, and Mollohan, McClintic & Mathews, on briefs), for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and McDOWELL, District Judges.

McDOWELL, District Judge. On July 12, 1897, Samuel B. Woods, appellant here and defendant below, conveyed to John T. McGraw a tract of 1,000 acres of heavily timbered land in West Virginia. The purchase price was \$8,500, to be paid one-third on delivery of the deed, one-third in six months, and the balance in twelve months from July 12, 1897, with interest on the deferred payments. To secure the deferred payments, McGraw executed on July 12, 1897, a deed of trust to one Morgan, with power to sell on default in payment. The cash payment was not made promptly, and there was considerable delay in payment of the sum due on January 12, 1898. These delays, even if considered as being to some extent excusable, embarrassed and annoyed Woods very greatly. Woods was so situated that he needed the sums coming to him from this sale, and it was to him of great importance that the payments be made punctually. Before the

† 2. See note at end of case.

last payment, due July 12, 1898, was due, Woods commenced to urge McGraw to meet it punctually, and advised him of his intent to have the deed of trust promptly foreclosed if there were a default. In fact, a sale under the deed of trust, advertised for a date earlier than the sale hereinafter mentioned, was intended; but because of some informality in the notices it was not held. Some time prior to August 10, 1898, Woods wrote McGraw, stating the amount due, and advising him that a sale of the land under the deed of trust would be held at Marlinton, W. Va., on August 13, 1898, unless the amount due were paid on or before said last-mentioned date. This letter advised McGraw that a remittance, to reach Woods in Charlottesville, Va., his home, before his departure for Marlinton (which is, or then was, some 40 miles from a railroad, and not reached by telegraph or telephone), must reach Charlottesville not later than August 10, 1898. Nothing having been heard from McGraw, Woods left Charlottesville for Marlinton on the night of the 10th. McGraw, who had previously received the above communication from Woods, telegraphed both to Woods and to a bank in Charlottesville on August 11th and 12th that he would pay the debt. Receiving no answer, McGraw then telegraphed his agents at Marlinton that he wished to pay the debt, but these messages were not delivered until after the transactions of August 13th, to be mentioned later, and until after Woods had left Marlinton.

At Marlinton, McGraw's agent was Yeager, and his attorney was McClintic. When the trustee, on the 13th of August, at Marlinton, started to cry off the land under the deed of trust, McGraw's agents—who had heard nothing from McGraw, and did not even know whether he wished to pay the debt and save the land or not—could think of nothing to do except to forbid the sale on the ground that the trustee had not conformed to a statute of West Virginia requiring trustees to give bond before making sales. This interruption led to the making of an agreement, the proper construction of which is warmly controverted. It reads:

I agree that John T. McGraw may have ten days in which to repay me the purchase money of land & two hundred & fifty dollars in full costs, etc., & on payment of which I will resell land to him or cancel this sale to-day & all trust deeds on said tract for my benefit.

Sam'l B. Woods.

Aug't 13th, '98.

The land was to-day bought by me at..... \$3,045 00
250 00

\$3,295 00

Another draft of this agreement, being the one kept by Woods, was signed by Yeager as agent for McGraw; but it does not otherwise differ from the above. The facts concerning this paper will be somewhat more fully stated later on. The agreement which is set out in this paper having been reached, the demand for the bond was withdrawn, the sale was resumed, and the land was bought by Woods at the price of \$3,045, which covers the debt and interest, and in part the trustee's commission. After the sale the agreement was reduced to writing and signed.

McGraw, as is contended, failed to observe the terms of this agreement of August 13th, and Woods, on August 25th, made another of—

fer to sell the land to him at the price named in the said agreement and an additional \$250. This was never accepted by McGraw. After considerable delay, the cause of which it will be unnecessary to consider, McGraw filed a bill in equity, praying in the alternative that the trustee's sale made to Woods on August 13th be annulled, or that the agreement of that date be enforced. The decree of the trial court was in favor of McGraw, and Woods appeals therefrom.

We think it unnecessary to expend many words on the contention of the appellant that the decree appealed from is one enforcing the offer made by Woods on August 25th, and which McGraw never accepted. The foundation for such idea, which is otherwise fully rebutted by the decree itself, is that the decree requires McGraw to pay \$250 more than the amount named in the agreement of August 13th (which we shall hereafter describe as the "Yeager" agreement). Of this McGraw is not complaining, and, if there be error herein, Woods is not injured thereby.

The contention made in the bill that the sale held on August 13th was invalid for want of due advertisement has been abandoned. The objection that the trustee gave no bond was distinctly waived, and the demand therefor withdrawn, after the Yeager agreement was reached, and before the land was bid in by Woods.

The first question to be decided is whether or not the Yeager agreement is an option given by Woods to McGraw to purchase, or repurchase, the land; or, in effect, an extension of time for the payment of the debt. It is earnestly urged that the true intent was that the trustee's sale should be regarded as a mere form, that the deed then forthwith to be made by the trustee to Woods should be treated as a mortgage securing the debt and the additional \$250, and that McGraw's equity of redemption was simply extended. We think that the true intent of the Yeager agreement was that McGraw should have an optional right for 10 days to again purchase the land at the price named. The language of the paper itself admits of no other construction. McGraw is given 10 days in which to "repay" the purchase money Woods was then about to bid for the land. On payment Woods was to "resell" the land to McGraw. The language "or cancel this sale to-day" simply states a method—an expeditious, but very slovenly and improper one—by which title would on the records be made to appear to be again in McGraw. To speak of this agreement as an extension of McGraw's time of redemption is to use inapt and inaccurate language. It gave him the option of paying a sum of money and having the land. If at the end of the time given he had not paid the money, there could not, under this agreement, have been any possible obligation on him to pay anything. If he elected not to exercise this option, there was nothing said, or done, or contemplated at the time of the agreement by reason of which Woods could continue to treat McGraw as his debtor. If, for instance, the timber had been destroyed by fire, on what ground Woods could contend that McGraw still owed the debt we cannot conceive. Mr. McClintic's testimony shows beyond question that the intent was that McGraw should have the right, if he wished, to repurchase the land within 10 days. Yeager, it is true, uses the word "re-

deem," instead of "repurchase," in his testimony. But Yeager's language is "a chance to redeem." And even he does not intimate that McGraw was to remain bound as the debtor. The weight of testimony is that the value of this land was depressed in August, 1898, and that the prospects of a railroad being built—which had been good in 1897, and became so again in 1899—were at that time poor. Moreover, neither Yeager nor McClintic had had any instructions from McGraw. They did not know that he desired the land. They had no authority to agree that he should continue bound for the debt; and the paper itself, the testimony of the witnesses, and the surrounding circumstances, absolutely forbid a conclusion that any one present on August 13th intended more than that McGraw should have, if he wished it, an opportunity to again purchase the land. The agreement is necessarily to be construed as giving McGraw an option. It is unilateral. It imposes an obligation on Woods, and none on McGraw. If the obligation to pay the debt had been kept alive, a nicer question might have been raised. But we find nothing on which to base the idea that Woods and McGraw were to continue in the relation of creditor and debtor. It is a conceded fact that McGraw did not make payment or tender within the 10 days. We shall discuss the evidence on this point, and also the evidence as to the reason offered for the delay, later on.

From what has been said, it follows that we are not now concerned with the rule as to bilateral contracts of sale of land, but with that applicable to "option" contracts.

In *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479, the contract read, so far as is now material:

"* * * I hereby agree that at any time within twelve months from this date, upon demand of J. S. Waterman, * * * I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four one-hundredths of the following mines. * * * R. W. Waterman."

No demand was made upon R. W. Waterman at any time within the 12 months. Says Mr. Justice Harlan, speaking of the above contract:

"It contains no word or clause indicating a purpose to create, as of its date, the relation of purchaser and vendor between him [J. S. Waterman] and R. W. Waterman. It gave the former * * * an option to demand a conveyance within a prescribed period, thus making time of the essence of the agreement. If a conveyance was not demanded within that period, the obligation of R. W. Waterman to make one ceased altogether. * * * The demand for a conveyance within a given time—looking alone at the writing—was made by the parties a condition precedent to the acquisition by J. S. Waterman of an interest in the property. R. W. Waterman did not agree to convey except upon the performance of that condition precedent. The condition being lawful, it is not competent for the court to dispense with its performance."

Then follow quotations to this same effect from *Story, Eq. Jurisp.* § 777a, *Potts v. Whitehead*, 20 N. J. Eq. 59, and *Lord Ranelagh v. Melton*, 2 D. & S. 281.

In *Kelsey v. Crowther*, 162 U. S. 408, 16 Sup. Ct. 810, 40 L. Ed. 1017, it is said that the rule as to performance within the time limit

is more stringently applied in cases of option sales, "where time is of the essence of the contract."

In Pomeroy on Contracts, the author states:

"Sec. 387. Where the contract is really an offer on one side, with a provision that the offer must be assented to and accepted, when a mere acceptance is contemplated, or payment must be made, when payment was the act of acceptance contemplated, at or before a specified date, then, of course, the act of assent or payment must be done within the prescribed time, and time is from the very form of the contract essential."

In 1 Pomeroy, Eq. Jurisp. (2d Ed.) § 455, it is said:

"It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. * * * It is also equally certain that when the contract is made to depend upon a condition precedent—in other words, when no right shall vest until certain acts have been done; as, for example, until the vendee has paid certain sums at certain specified times—then also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent."

See, also, 22 Am. & Eng. Ency. (1st Ed.) notes, p. 1056.

In addition to the fact that the form of the contract makes time of the essence, we cannot escape the conclusion that the parties present at Marlinton on August 13th fully intended that the contract should be so construed. There was not only Woods' urgent need for money, and his obligations to be met, and his former annoying experiences with McGraw's delays in making payment; but the exact number of days to be allowed McGraw was a matter of dispute, finally fixed as stated in the agreement. Woods wanted \$500 bonus and an option for only a week given McGraw. The latter's agents finally induced him to reduce the sum demanded to \$250, and to extend the time to ten days. This is clearly not a case where the time of performance stated is merely a convenient one, where a reasonable delay would have been of no importance. Under the circumstances here, a court of equity has no right to extend the time.

In 3 Parsons, Contracts (7th Ed.) 340, it is said:

"But if it seems that * * * a material part of the value of the transaction to the defendant depends upon its being done at a certain time, * * * or that the substitution of any other will subject him in any way to loss or material inconvenience, then time is certainly of the essence of the contract, so far as he is concerned, and the court will so regard it."

See, also, 3 Pom. Eq. Jurisp. (2d Ed.) § 1408; *Carter v. Phillips* (Mass.) 10 N. E. 500; *Kerr v. Hill*, 27 W. Va. 577.

The time limit for payment by McGraw expired on August 23d. On that day the Grafton bank—a West Virginia bank, of which the cashier, C. R. Durbin, was McGraw's brother-in-law and agent—telegraphed the People's National Bank of Charlottesville, Va.: "We will forward to you \$3,295, to be paid to Sam'l B. Woods, on account of Jno. T. McGraw. Kindly see Mr. Woods and wire us at once, and we will pay you for trouble." This telegram was not to Woods, and the bank to which it was sent was not his agent. On the day the option expired, not Woods, but an agent of McGraw's, is informed that another agent of McGraw's will forward the money. Why the request

was made that the Charlottesville bank people see Woods is not explained, but it seems as if it were a very natural effort to learn if Woods would accept the belated payment. On August 23d the Charlottesville bank—having no authority from Woods, and acting necessarily as McGraw's agent—telegraphed the Grafton bank: "Woods' whereabouts unknown; will return Thursday [August 25th]. We will follow instructions if you send money to us." On August 23d Mr. Durbin again telegraphed the cashier of the Charlottesville bank, "Will forward the amount to-morrow." But Mr. Durbin either changed his mind, and mailed the draft on the 23d, or he misdated the following letter, written to the Charlottesville bank, and dated August 23d: "In accordance with the above and a later telegram received from you, I enclose you our draft on New York for \$3,295, and also an agreement signed by Mr. Woods, at Marlinton. Kindly place the same to Mr. Woods' credit on his delivering to you the proper receipt for same, and much oblige." The draft inclosed was payable, not to Woods, but to the Charlottesville bank. The agreement was not inclosed. This letter did not reach Charlottesville until August 24th. There is some confusion in the record as to whether Woods refused to accept the tender thus made, or whether the Charlottesville bank refused to put the draft to his credit. A careful consideration of the testimony has convinced us that the latter is the truth. In a letter written by Mr. Robertson, of the Charlottesville bank, on August 26th, he says that Woods refused the draft. In both his and Woods' deposition the other version is given. This letter was written on August 26th, after Woods had unequivocally declared the option ended, and had so informed Mr. Robertson, and had refused to accept the draft. And on the 24th the Charlottesville bank telegraphed the Grafton bank, "Yours of yesterday, containing draft, but no agreement, as stated." No point is made that the tender was made by draft, and not in legal-tender currency. But we find no sufficient excuse for the fact that a draft was not forwarded in time to reach Charlottesville on the 23d. There is no pretense that a draft deposited in the mail at Grafton on the 23d, after sending the first telegram of that date, could have reached Charlottesville that day. But, even if it had reached Charlottesville in time, the Charlottesville bank was forbidden to put it to the credit of Woods until "the proper receipt" was given. And the nature of this receipt was made to depend on an agreement that was not inclosed. Whether Mr. Woods was in Charlottesville on the 23d or 24th, we do not know. But we are satisfied from the evidence that on the 25th the Charlottesville bank—McGraw's agent—refused to put the draft to his credit, because the bank did not know the nature of the receipt required. Later on in the day of the 25th, Woods, by a letter written to McGraw, distinctly announced that the Yeager agreement was at an end, and so informed the Charlottesville bank. At no time on the 23d, 24th, 25th, or 26th of August could Woods have obtained the draft, or had it put to his credit. And we think he acted clearly within his rights when he, on the 25th, took the position—from which he never afterwards varied—that the option had expired. We do not find it necessary to discuss the contention that McGraw's agents were acting under instructions to try to keep the option open by a merely seem-

ing effort to make the payment. Assuming that McGraw intended to make payment in due time, he was most unfortunate in the selection of his agent at Grafton. If the Charlottesville bank had put the draft to Woods' credit, even as late as August 26th, it would have violated its instructions from the Grafton bank, and would have made itself liable for such violation. There was a telegram sent on August 27th by the Grafton bank to the Charlottesville bank, after the receipt of Woods' letter of August 25th, and intended by the Grafton bank as an acceptance of the new offer of sale made in that letter. This telegram directed that the \$3,295 be paid to Woods, and promised payment of the additional sum demanded by Woods. But this act of the Grafton bank was repudiated by McGraw, the additional sum was not sent, and Woods never accepted the draft for \$3,295, which had been, on August 26th, sent back to Grafton by the Charlottesville bank.

The Yeager agreement was an "option." Payment on or before August 23d was of its essence. McGraw forfeited his rights under it without valid excuse for his delay, and we are constrained to hold that the trial court erred in directing a performance of that agreement. It is unnecessary to say that the hardship on the appellee involved in this conclusion cannot excuse us from doing justice to the appellant.

The decree of the Circuit Court will be reversed; with costs, and the cause remanded, with directions that the bill be dismissed, at the cost of the complainant below. Reversed.

NOTE.

Specific Performance of Contract of Which Time is the Essence.

I. APPLICATION OF RULE IN GENERAL.

[a] (U. S. 1825) Time is not generally of the essence of a contract; but where it appears that time is really material to the parties, the right to a specific performance may depend on it.—*Garnett v. Macon*, Fed. Cas. No. 5,245 [2 Brock. 185].

[b] (U. S. 1838) In a suit for the specific performance of a contract, time will not be considered as essential, where the same justice can be done between the parties, and neither has sustained inconvenience by the delay, and the property has not changed in value.—*Longworth v. Taylor*, Fed. Cas. No. 8,490 [1 McLean, 395], affirmed *Taylor v. Longworth* (1840) 39 U. S. (14 Pet.) 172, 10 L. Ed. 405.

[c] (U. S. 1899) Even when time is made of the essence of a contract, the failure of a party to comply with a condition within the particular time limited will not work a forfeiture nor defeat the right to enforce specific performance, where such condition is complied with within a reasonable time, and no circumstances have intervened to render it unjust or inequitable to grant such relief, but, on the contrary, it would be inequitable to withhold it.—*Camp Mfg. Co. v. Parker*, 91 Fed. 705, 34 C. C. A. 55.

[d] (Conn. 1853) When parties have deliberately, by their agreements or covenants, fixed the time for the performance of an act, a court of equity will be very cautious how it interferes in disregard of it, and will not do this, unless, by reason of mistake or for other cause falling within the legitimate province of such court, it shall see that essential justice demands the exercise of its jurisdiction.—*Potter v. Tuttle*, 22 Conn. 513.

[e] (Conn. 1870) Every agreement as to time is not of the essence of the contract, and therefore every failure by the petitioner in a literal performance does not of necessity furnish a sufficient defense against a bill for a specific performance. The broken stipulation should be of such a character as to constitute a condition precedent to the petitioner's right to enforce the contract.

or be such as, on its nonfulfillment without reasonable excuse, to render in terms the contract void; or, in some other manner to make it clearly inequitable, under circumstances of fraud, mistake, surprise, unreasonable delay, gross neglect, bad faith, or other manifest unconscientiousness, that the petitioner should have a decree.—*Quinn v. Roath*, 37 Conn. 16.

[f] (Conn. 1895) In contracts giving a person an option to purchase a chattel for a given price within a limited time, time is of the essence of the contract, so as to prevent specific performance on failure without excuse to purchase within the specified time.—*Roberts v. Norton*, 66 Conn. 1, 33 Atl. 532.

[g] (Idaho, 1891) Though time may be expressly made of the essence of a contract, or may appear to be so from the circumstances of the case, and laches a bar to specific performance, yet generally time is not so treated, by a court of equity, in the absence of negligent delay, or delay unaccounted for.—*Durant v. Comegys*, 28 Pac. 425, 3 Idaho (Hasb.) 204.

[h] (Idaho, 1891) Where specific performance is demanded on the ground that time was not of the essence of the contract, plaintiffs must make out a case free from doubt, and show that the relief asked for is, under all the circumstances of the case, equitable, and account in a reasonable manner for their delay and apparent omissions.—*Durant v. Comegys*, 28 Pac. 425, 3 Idaho (Hasb.) 204.

[i] (Ill. 1848) Although the general rule in equity is that time is not necessarily deemed of the essence of the contract, unless the parties have expressly so regarded it, or it necessarily results from the nature and circumstances of the contract, yet the parties to a contract may make time of the essence of their agreement; and when this clearly appears to have been their intention, and no peculiar circumstance has intervened to prevent or excuse a strict performance, it must be so considered and treated in equity.—*Smith v. Brown*, 10 Ill. (5 Gilman) 309.

[j] (Ill. 1859) Time may be of the essence of a contract, and where that is made clearly to appear, the court will enforce a forfeiture, unless there are circumstances for which they will relieve against it.—*Steele v. Biggs*, 22 Ill. (12 Peck) 643.

[k] (Ill. 1874) Where the vendor in a contract for the sale of land offers to perform, on his part, within the time named in the contract, and the purchaser has the means and ability to perform on his part, but refuses to do so, and is informed that unless he does so on or before the day for performance named in the contract the vendor will not convey, and he still refuses to perform without any reasonable excuse for so doing, and permits the time named in the contract to expire before offering to perform, he cannot have a specific performance of the contract enforced in a court of equity, though time was not of the essence of such contract.—*Ditto v. Harding*, 73 Ill. 117.

[l] (Iowa, 1851) Where the time of performance appears to be a distinct and essential feature in a contract, it should be considered material, and be enforced in equity.—*Garretson v. Vanloon*, 3 G. Greene, 128, 54 Am. Dec. 492.

[m] (Iowa, 1856) A court of equity will not consider time as not of the essence of the contract in behalf of one seeking specific performance, if he has been guilty of gross laches or has been inexcusably negligent in performing his portion of the contract.—*Young v. Daniels*, 2 Iowa (2 Clarke) 126, 63 Am. Dec. 477.

[n] (Ky. 1803) Courts of chancery will compel the specific performance of contracts after the time agreed on by the parties for execution has elapsed, and without an inquiry into the equality of the considerations; but, where a contract on the part of the complainant was fraudulent in its origin, and was entered into by the other party by mistake produced by the fraud, or where it has been afterwards attended by some peculiar hardship, occasioned by a delinquency on the part of the complainant, for which an adequate compensation cannot be devised, in either of these cases the court will dissolve the contract if the parties can be thus left in the same condition in which they were before the contract was made.—*Meaux v. Helm's Heirs*, 2 Ky. (Ky. Dec.) 252, 2 Am. Dec. 716.

[o] (Me. 1839) Where the binding efficacy of a contract has been lost by lapse of time, a court of equity will grant relief when time is not of the essence of the contract; but where the party asking performance has been guilty

of laches, and offers no satisfactory reason for it, and the other party has not waived or acquiesced in it, no relief can be granted. Nor will it be granted where the remedies are not mutual, and where the party not bound lies by to see whether it will prove a gaining or losing bargain, and acts accordingly. If the contract relate to wild land, where the principal value is timber, time may be of the essence of the contract.—*Rogers v. Saunders*, 16 Me. (4 Shep.) 92, 33 Am. Dec. 635.

[p] (Minn. 1874) Time, in the performance of contracts, in so far as it involves the good faith and diligence of the parties, will, in equity, be regarded as of the essence of the contract.—*Gill v. Bradley*, 21 Minn. 15; *McDermid v. McGregor*, Id. 111.

[q] (Minn. 1894) Where a contract in which time was the essence was fully performed by one party, he could require performance by the other after the time.—*Robbins v. Morgan*, 56 Minn. 304, 57 N. W. 799.

[r] (N. H. 1860) In equity, time is not of the essence of a contract, unless clearly made so by its terms or the understanding of the parties.—*Pennock v. Ela*, 41 N. H. 189.

[s] (N. J. 1888) Plaintiff and defendant joined in purchasing a lot and erecting a dwelling house on it, and purchased stock of a building and loan association, and on the loan obtained were required to make monthly payments. They agreed that if at any time either should fail to pay his share of the dues for two months, he should surrender to the other his right to the stock, and convey to him his interest in the premises. *Held*, that time was an essential ingredient in the contract, and that defendant, who had defaulted for two months and a half in the payment of the dues, must convey his interest.—*Nagell v. Lenimer* (Ch.) 16 Atl. 205.

[t] (N. Y. 1833) Where the intention of the parties to a contract to make the time of performance essential clearly appears, equity will not relieve against a failure to perform at the day.—*Wells v. Smith*, 2 Edw. Ch. 78.

[u] (Ohio, 1885) Defendant purchased real estate at public auction, the auctioneer announcing that perfect title would be made, and immediate possession given. A deed was tendered to defendant immediately after the sale, but, on account of invalid execution, another deed was made necessary to be executed by a nonresident party. *Held*, that defendant could not be required to take the second deed tendered to him 11 months after the sale, it appearing that immediate possession was of the essence of defendant's contract of purchase.—*Ursuline Community v. Huneke* (Cin. Super. Ct.) 24 Wkly. Law Bul. 153.

[v] (Wis. 1855) Ordinarily payment of the price at the day is not necessary where not expressly stipulated for, and where the purchaser can be compelled to make ample compensation for the delay.—*Reed v. Jones*, 8 Wis. 392.

II. CONTRACTS FOR CONVEYANCE OF REAL PROPERTY IN GENERAL.

[a] In general, time is not considered, by courts of equity, to be of the essence of the contract for the sale of lands. But when the terms of the contract or the nature and circumstances of the transaction clearly show that it was the intention of the parties to secure a right to an exact performance, in respect to time, equity will enforce the right.

—(Iowa, 1869) *Prince v. Griffin*, 27 Iowa, 514;

(N. J. 1869) *King v. Ruckman*, 20 N. J. Eq. (5 C. E. Green) 316; *Bullock v. Adams' Ex'rs*, Id. 367.

[b] (U. S. 1821) The rule that time is not of the essence of a contract, though not a universal one, is recognized in courts of equity; and a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself, deprive him of his right to a specific performance at a subsequent day, when he is able to comply with his part of the engagement.—*Brashler v. Gratz*, 19 U. S. (6 Wheat.) 528, 5 L. Ed. 322.

[c] (Ala. 1837) Time is essential, in a parol contract for the sale of land, in respect to the specific performance of it by a court of equity.—*Goodwin v. Lyon*, 4 Port. 297.

[d] (Ill. 1850) In a contract for the sale of land, where a credit is given for a part of the purchase money, and a conveyance is to be executed upon the payment of the last installment, and no peculiar importance attaches to the

day set for the payment of the balance of the purchase money, a court of chancery may, in the exercise of a sound legal discretion, when called upon to enforce the specific performance of such a contract, overlook the lack of punctuality in the payment of the purchase money, according to the terms of the agreement, where fair dealing and good conscience require it.—*Glover v. Fisher*, 11 Ill. (1 Peck) 666.

[e] (Iowa, 1846) The time fixed for performance is deemed of the essence of the contract, and if the seller is not ready and able to perform on the day, the purchaser may elect to consider his contract at an end.—*Benedict v. Weston*, Morris, 490.

[f] (Ky. 1827) Time is not of the essence of executory contracts for land, to enforce the specific execution.—*Kercheval v. Swope*, 22 Ky. (6 T. B. Mon.) 362.

[g] (Ky. 1864) Courts of equity will not, ordinarily, regard time as of the essence of a contract for the sale of land, but will specifically enforce it, even though the plaintiff may have failed to pay the money or convey the title on the day stipulated; but where there is a want of mutuality in the obligations arising from a contract of purchase, time is essential as well in equity as at law.—*Magoffin v. Holt*, 62 Ky. (1 Duv.) 95.

[h] (Me. 1858) Time is not of the essence of a contract for the conveyance of real estate, and if it be waived by the parties the agreement will be enforced.—*Hull v. Sturdivant*, 46 Me. 34.

[i] (Mich. 1882) A few days' delay in making payment under a contract to buy land will not forfeit the vendee's right to compel a specific performance even though time was of the essence of the contract.—*Voltz v. Grummett*, 49 Mich. 453, 13 N. W. 814.

[j] (Minn. 1874) Though the time for making payment for land contracted to be conveyed will not ordinarily be regarded as of the essence of the contract, it is proper for a court of equity, in a suit for specific performance, to regard delay in making such payments or offer to perform as bearing on the question of good faith and diligence.—*McDermid v. McGregor*, 21 Minn. 111.

[k] (N. Y. 1815) In the sale of lands, time may be of the essence of the contract; and in the absence of any just excuse for default at the day, and of any acquiescence or waiver by the other party, the court will not aid the party in default.—*Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484.

[l] (N. Y. 1825) Upon a contract for the sale of lands, the deed, duly executed, was deposited in the hands of a third person, to be delivered when the purchaser should secure the payment of the purchase money, according to contract, and the purchaser took possession, and paid a portion of the purchase money. Held, that this transaction was equivalent to a purchase and mortgage back for security; and that the purchaser was entitled to a completion of the purchase, although he had not paid at the day, there being no indication that the parties considered the time of payment essential.—*Leggett v. Edwards*, Hopk. Ch. 530.

[m] (N. Y. 1846) In an agreement for the sale of lands time is always material when either party chooses that it shall be so. Each of them has a right to demand the performance of the contract on the stipulated day, and if the other party is then unwilling or unable to perform, may elect to rescind it. By such an election he is wholly freed from the obligations of the contract, and a court of equity cannot subsequently decree its specific performance.—*Dominick v. Michael*, 6 N. Y. Super. Ct. (4 Sandf.) 374.

[n] (N. Y. 1864) Time is not ordinarily considered by courts of equity as of the essence of a contract in regard to real estate, though it may, under certain circumstances, be made or become so; but the general rule is that if a party has not been guilty of gross neglect, if his delay can be reasonably explained, and be consistent with good faith, and time has not been made material by the contract of the parties, a court of equity will afford relief.—*Williston v. Williston*, 41 Barb. 635.

[o] (N. Y. 1871) So long as neither party to an agreement of sale makes any tender of the deed on one hand, or of the bond and mortgage or money on the other, neither party is in default, and the contract subsists. Either party may make the proper tender, and insist upon specific performance, at any time, until barred by the statute of limitations.—*Leaird v. Smith*, 44 N. Y. 618.

[p] (N. C. 1845) The time mentioned in a contract for completing the pur-

chase of land will not be considered in equity as necessarily of the essence of the contract.—*Wells v. Wells*, 38 N. C. 596.

[q] (Or. 1874) Time is not of the essence of a contract to convey land at a future day, unless the language of the contract clearly indicates that it was so intended by the parties. Where, by the terms of the contract, time is not made material, either party may enforce performance by executing or tendering the execution of the contract on his part, and demanding the same of the opposite party.—*Knott v. Stephens*, 5 Or. 235.

[r] (S. C. 1853) Where no time is fixed in the contract for the sale of land, time is not essential; it will not, however, be permitted to the party who is to make the conveyance to trifle with the interests of the opposite party by unnecessary delay. It is in the power of the party to fix some reasonable time, not capriciously or with intent to surprise, but a reasonable time, according to the circumstances of the case, within which he will expect the title to be made, at the peril of rescinding the agreement.—*Thompson v. Dulles*, 5 Rich. Eq. 370.

[s] (Tex. 1856) In an action by a vendee for the specific performance of a bond for title to land, part of the consideration of which has been paid, equity will not refuse relief because the balance was not paid at the times specified in the bond, where the bond does not, by its terms, make the time of payment an essential part of the contract.—*Primm v. Barton*, 18 Tex. 206.

[t] (Wis. 1856) Where parties do not appear to have made the time for the payment of the purchase money essential, courts will hold the bargainor to the contract, and compel him to convey, although the purchase money was not paid or tendered at the exact time fixed in the contract for the payment.—*Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57.

III. CIRCUMSTANCES AFFECTING ESSENTIALITY.

[a] (U. S. 1829) Time is of the essence of the contract where the vendee has purchased to sell; and such a purpose is a lawful one, which may be considered by a court of chancery.—*McKay v. Carrington*, Fed. Cas. No. 8,841 [1 McLean, 50].

[b] (U. S. 1873) In cases in which the contract and the remedy are not reciprocal, or in which there has been a considerable change in the value of the land, equity will consider time to be material in the case of an agreement to convey.—*Prentice v. Betteley*, Fed. Cas. No. 11,381 [2 Low, 289].

[c] (Cal. 1856) Where the plaintiffs gave their note to the defendants, payable in one year, and bearing interest at the rate of 10 per cent. per annum, at a time when the current rate of interest was 10 per cent. per month, in consideration of which he received a covenant from the payees to convey them certain land on the payment of the note at maturity, the low rate of interest raises the presumption that the parties intended that the note should be paid at maturity.—*Brown v. Covillaud*, 6 Cal. 566.

[d] (Cal. 1904) Where a contract for the sale of land to plaintiff's decedent provided that time was of the essence, and required deceased to perform various personal services, etc., within the time prescribed, before defendant should be under any obligation to convey the land, and before any steps had been taken by deceased to perform such acts defendant repudiated the contract, and at the time suit was brought for specific performance deceased had not performed such acts, and could not perform them within the time prescribed, plaintiff could not enforce specific performance, though the failure to perform resulted from defendant's breach of the contract.—*Moore v. Tuohy*, 75 Pac. 896.

[e] (Fla. 1897) Where time is by express stipulation in a contract to sell made material, the failure of a party to perform a condition within the particular time limited will not defeat his right to specific performance if he subsequently performs the condition without unreasonable delay, and no circumstances have arisen to prejudice the vendor, who bases his refusal to perform on the failure of the vendee to strictly comply with such condition.—*Shouse v. Doane*, 21 South. 807, 39 Fla. 95.

[f] (Ill. 1845) Complainant agreed to convey to defendant on or before a certain day on payment of a certain note, but was obliged to be absent on that day. Defendant made no tender of payment, and on complainant's return refused his tendered deed, and also refused payment. *Held*, that a bill for specific per-

formance would lie; time not being of the essence of the contract.—*Andrews v. Sullivan*, 7 Ill. (2 Gilman) 327, 43 Am. Dec. 53.

[g] (Iowa, 1876) Though a written contract for the sale of land not in terms make time of its essence, specific performance was denied where the vendor insisted on performance on the day specified, and the purchaser was unprepared with the purchase money, but tendered it 15 days later, which tender was refused.—*Thurston v. Arnold*, 43 Iowa, 43.

[h] (Iowa, 1876) Purchasers of property, understood by both parties to have been bought for immediate use, cannot be compelled to perform when the seller delays making title so long as to frustrate the object of the purchase—as where a receiver selling partnership realty seeks specific performance several months after the sale; he having in the meantime been unable to give a good title on account of a pending litigation against him.—*Parsons v. Gilbert*, 45 Iowa, 33.

[i] (Ky. 1808) Where defendant sold land, in 1781, to complainant, for \$35,000 in Continental currency, to be paid in 40 days, complainant knowing that such currency was depreciating very rapidly, which knowledge was not shared by defendant, and complainant delayed payment for a number of years, equity will consider time of the essence of the contract, and rescind it.—*Meaux v. Helm's Heirs*, 2 Ky. (Ky. Dec.) 252, 2 Am. Dec. 716.

[j] (Md. 1893) Defendant leased to plaintiffs a lot, and agreed that they might purchase it on or before a certain day at a stated price. Plaintiffs entered under the lease, and, with a view to its purchase, made improvements on the lot, but were unable to make payment of the purchase price until a few days after it was due, and defendant had gone away. On his return, 10 days after, plaintiffs tendered the purchase money and demanded a deed, which he refused. *Held*, that time of payment was not of the essence of the contract for the sale, and equity will compel specific performance.—*Wilson v. Herbert*, 76 Md. 489, 25 Atl. 685.

[k] (Mass. 1864) The holder of a contract for the conveyance of land sold his interest in the same, and, for the accommodation of the purchaser, made an assignment of the contract to another to secure an indebtedness of the purchaser. The assignee afterwards gave the purchaser an agreement binding himself to transfer the contract to him on payment of a certain note at maturity. *Held*, that such agreement was not a conditional sale, but a declaration of the trust under which the assignee held the contract, and that he could not insist that the prompt payment of the note at maturity was of its essence, and, after default, refuse to transfer the contract on offer of performance.—*Pin-gree v. Coffin*, 78 Mass. (12 Gray) 288.

[l] (Mich. 1872) While several parties were seeking to buy of J. a city lot, the value of which was being rapidly enhanced by the daily increasing certainty of the establishment of a public improvement, she informed H. on Saturday that she would then sell it to him for \$11,000, but that she would not promise to do so after that. He received an abstract, but made no further response till after the next Tuesday, when she had sold the lot to another. His bill for specific performance was dismissed.—*Hawley v. Jelly*, 25 Mich. 94.

[m] (Mo. 1836) At a sale on execution, the plaintiff's attorney bought the land sold, and afterwards sold the same to A., who gave his bond to the defendant to convey to him in consideration of sums paid and to be paid; the bond to be void on failure to pay at a day certain. The defendant failed to obtain the money, when B. advanced it for him, took a conveyance to himself, and gave a similar bond to the defendant, who again failing to raise the money, procured B. to convey to C., who gave the defendant a written promise to convey to him, on payment of a specified sum, on a day fixed. *Held*, that after the lapse of the specified date neither the defendant nor his creditors had any claim in equity against C. for specific performance of the contract.—*Russell v. Geyer*, 4 Mo. 384.

[n] (Mo. 1901) Plaintiff and defendant exchanged property, and agreed that plaintiff should take a two-years lease of the property, to be conveyed to defendant as soon as the deeds were exchanged, and that, if the titles proved perfect, the deeds should be delivered by July 1, 1897, which time was twice extended to allow time to examine the respective titles. Defendant objected to plaintiff's title on other grounds, without mentioning that a 9½ inch strip had

been sold off from one side of the lot, until after several months' negotiations in reference to the other objections. Plaintiff purchased the 9¼-inch strip in March, 1898, after he had instituted a suit for specific performance, and at the time of the rendition of the decree was able to furnish a perfect title. *Held*, that the contention that plaintiff was not entitled to specific performance, because time was of the essence of the contract, could not be sustained, since it was defendant's duty to have notified plaintiff of the defect, and the agreement to lease the property to plaintiff showed that defendant was not prejudiced by the failure to get immediate possession of that particular property.—*Scannell v. American Soda Fountain Co.*, 61 S. W. 889, 161 Mo. 606.

[o] (N. J. 1868) An agreement for the extension of an equitable mortgage and the conveyance of the property, when the mortgage debt should be paid, to the mortgagor, on condition that the mortgagor should pay the interest once in six months, and the mortgagee be allowed to receive the rents of the mortgaged property in payment of the principal, would not be rendered invalid, nor would specific performance be refused, because the interest was not paid at the time stipulated.—*De Camp v. Crane*, 19 N. J. Eq. (4 C. E. Green) 166.

[p] (N. J. 1868) Time is frequently considered not of the essence of an agreement to convey lands; but in all cases where the value of the property has materially changed, or where great financial changes have materially altered the relative value of money and land, time will be considered material, and a party will not be allowed to lie by until the change sets in his favor, and then ask for specific performance.—*Merritt v. Brown*, 19 N. J. Eq. (4 C. E. Green) 286.

[q] (N. J. 1874) Where the purchaser took possession, but by mutual consent the delivery of the deed was postponed to a future day, but meanwhile prevented by a disagreement as to the terms of payment, and subsequently the vendor tendered the deed on the original terms, *held*, that time was not of the essence of the contract, in such manner as to relieve the purchaser from its performance, where he had suffered no loss, even though the original default was on the part of the vendor in not accepting certain notes agreed upon as a substitute for cash.—*Sharp v. Trimmer*, 24 N. J. Eq. (9 C. E. Green) 422.

[r] (N. J. 1889) A contract for sale of land acknowledged a sum in earnest, and provided that the balance be paid within five days, but did not specify a place of payment. On the third day the parties met, and agreed to meet that evening and complete the contract. The vendee went to the place where, as he testifies, they agreed to meet, while the vendor remained at his residence, where he and others testify that the meeting was to take place. At this time a lien on the land remained undischarged, so that the vendor could not give title. After the expiration of the five days, the vendee repeatedly tried to find the vendor, but failed, and there was evidence tending to show that the latter knew that the vendee had contracted to sell at a profit, and therefore he did not wish to complete the contract. He had stated when making the contract that he was in need of money, but he did not use the check given as part payment. The evidence showed the price to be the fair value of the land. The vendee finally tendered the price, and it was refused. *Held*, that time was not of the essence of the contract, and specific performance would be decreed.—*Dynan v. McCulloch*, 46 N. J. Eq. 11, 18 Atl. 822.

[s] (N. Y. 1855) The plaintiffs and defendants, not being able to agree on the price of certain lands, by agreement, in writing, appointed three persons to determine the same. Within 10 days after notice of the determination of the appraisers, the plaintiffs were to convey a perfect title to the premises, and the defendants to pay the amount of the award. In due time, the plaintiffs tendered a deed, containing a covenant against incumbrances, to the treasurer of the company. He declined to receive it on account of the absence of the president, not objecting to the title. At the time of this tender there was a mortgage on the premises to secure a debt of small amount, which mortgage was discharged within 18 days from the award. On the return of the president, the plaintiffs tendered the deed to him. He made no objection that the tender was too late, or that there was any subsisting incumbrance, but subsequently returned the deed. The defendants, having taken possession before the award, continued occupation and work on the premises after the award, and took no measures to rescind the contract, but refused to execute their part

of it, by paying the amount of the award. A bill in equity for specific performance having been brought, it was *held* that the defendants, by their acts of occupation after the award, had waived the condition of perfect title within 10 days, that time was not of the essence of the contract, and that, notwithstanding the failure of the plaintiffs to make perfect title within 10 days from the date of the agreement, specific performance might be decreed, if the plaintiffs could make a perfect title at the time of the decree, and that whether the court will make such decree is a matter for their sound and legal discretion.—*Viele v. Troy & B. R. Co.*, 21 Barb. 381.

[t] (N. Y. 1870) A purchaser of land at auction, who fails to comply with the requirements of the sale by paying the balance of the purchase price within the time agreed upon, is entitled to specific performance where it appears that, though the vendors have declared the sale void, the execution of the contract by the vendors is not embarrassed by any new relations with other parties, and the vendors have accepted the 10 per cent. required to be paid on the day of sale, and have tendered a deed, and demanded a performance; and this, though the purchaser has never tendered or offered strict performance on his part.—*McClaskey v. City of Albany*, 64 Barb. 310.

[u] (N. Y. 1904) A contract to sell land was on the express condition that, if the vendor should not acquire title from a third party on or before a certain date, it should be void, and a cash payment made at the time of the contract should be returned. On the date named the title was found defective, the vendee refused to accept it, and the vendor refused to extend the time to have it perfected, tendered back the cash payment, and did not accept title from the third party. *Held*, that specific performance could not be enforced against the vendor when the title was thereafter perfected and conveyed to him, time being of the essence of the contract. Judgment (1903) 83 N. Y. Supp. 582, 41 Misc. Rep. 39, reversed.—*Baldwin v. McGrath*, 85 N. Y. Supp. 735, 90 App. Div. 199.

[v] (Ohio, 1889) Where a contract provides for the exchange of realty, to be divided into suburban lots, for a farm, stock, and tools, as a going concern, the title and possession of which are to be delivered on May 1st, and it appears that the suburban property is rapidly fluctuating in value, the time of performance is sufficiently material to make it inequitable to enforce a purchase on a title to the tract not perfected by the vendor until several months after objection by the vendee and the time fixed for the performance.—*Breuer v. Hayes*, 10 Ohio Dec. 583, 22 Wkly. Law Bul. 144.

[w] (Pa. 1850) Time will not be considered as of the essence of a contract, in proceedings for specific performance, brought by vendors, where they attempted to tender deeds to the vendee and were prevented by her illness and death, and have ever since been using their best endeavors to procure legal enforcement of the contract, though they might have chosen a more effective remedy.—*Tiernan v. Roland*, 15 Pa. (3 Harris) 429.

[x] (S. D. 1901) Plaintiff contracted to sell certain land to defendant; payment to be made in installments on the 1st day of September in each year after September, 1890, "together with interest, payable annually, on all sums, whether principal or interest, after due"; time to be of the essence of the agreement. Defendant entered and made valuable improvements on the land, and on September 2, 1890, paid plaintiff \$85 interest, and alleged an extension of time for the payment of the principal due September 1, 1891. On December 8, 1891, plaintiff demanded payment of the principal due on September 1st, and, on defendant's failure to pay the same, declared the contract forfeited on the 11th of the same month, and brought suit to recover possession of the land, which was dismissed. On September 1, 1892, defendant offered to pay plaintiff the entire sum due, with interest, which plaintiff refused, whereupon defendant caused the amount to be deposited in a bank to plaintiff's credit. *Held*, that the provision of the contract that time should be of its essence was binding as well on the plaintiff as on the defendant, and hence, plaintiff having omitted to declare a forfeiture for three months after he was entitled to do so, on September 1, 1891, he thereby waived the same, and defendant was therefore entitled to enforce specific performance of the contract.—*Pier v. Lee*, 86 N. W. 642, 14 S. D. 600.

[y] (Tex. 1858) Where the time or manner of payment implies a peculiar inducement to making the contract, it will be deemed of its essence, and the failure will not be deemed waived, from the absence of a manifested intention to rescind.—*Younger v. Welch's Ex'x*, 22 Tex. 417.

[z] (Va. 1831) Though time is not material in the inception of a contract, if it becomes so afterwards by the conduct of the parties, the party in default is not entitled to demand its specific execution.—*Jackson v. Ligon*, 3 Leigh, 161.

IV. STIPULATIONS AFFECTING ESSENTIALITY.

1. In General.

[a] (Ala. 1889) A bond for a deed, stipulating that the erection of certain improvements within six months is the principal consideration of sale, and that a failure so to do will work a forfeiture, must be strictly construed, and inexcusable neglect to make the required improvements for two years is a good defense to a bill by the heirs of the purchaser for specific performance.—*Haggerty v. Elyton Land Co.*, 89 Ala. 428, 7 South. 651.

[b] (D. C. 1894) Where a contract for the sale of lands requires the vendee to give a note for the deferred installment of purchase money, with a trust deed securing it, and to prepare and tender a deed for execution within 30 days from the date of the contract, the vendee's noncompliance with such requirements is fatal to an action by him for a specific performance.—*Lipscomb v. Watrous*, 3 App. D. C. 1.

[c] (Ill. 1864) Parties to a contract have a right to make the time of its performance material, and when they have done so a court of equity has no power to enforce its specific performance, when the plaintiff has failed to perform his part of it at the stipulated time.—*Stow v. Russell*, 36 Ill. 18.

[d] (Iowa, 1856) In an agreement to convey, with a clause, "should the taxes and note not be paid when due, I reserve the right to sell at any time to any person," time is of the essence of the contract.—*Tomlinson v. Smith*, 2 Iowa (2 Clarke) 39.

[e] (Iowa, 1856) A. had a claim on public land, and was in possession about six years. He then procured B. to enter the land, took a lease from him agreeing therein to quit at the end of the term, with a proviso that if he then paid B. \$100, he should have a quitclaim deed, and a stipulation that "the above shall be forfeited if either shall not keep all the covenants." The court held thereupon that this was not a mortgage, as no loan appeared from B. to A. and no conveyance from A. to B.; and that as a contract time was of its essence, and that B. after the day held nothing to enforce against A., and specific performance was refused.—*Usher v. Livermore*, 2 Iowa (2 Clarke) 117.

[f] (Iowa, 1856) Time is of the essence of the contract where expressly so stipulated.—*Davis v. Stevens*, 3 Iowa (3 Clarke) 158.

[g] (Mich. 1862) A contract for the sale of land stipulated that, on the vendee's failure to fulfill certain agreements at specified times, the vendor might re-enter, and then the vendee's rights should be null and void, and his payments and improvements forfeited. Held, that time was not so far of the essence of the contract that all the equitable rights of the vendee were forfeited merely upon his failure to pay or perform at the times agreed.—*Morris v. Hoyt*, 11 Mich. 9.

[h] (Mich. 1864) Time cannot be made essential in a contract merely by so declaring, if it would be unreasonable to allow it.—*Richmond v. Robinson*, 12 Mich. 193.

[i] (Neb. 1874) In an action for specific performance, the contract must be plainly established, and the acts of part performance must unmistakably relate to the contract in suit. In contract for sale of lands, a court of equity may grant relief to one who was behind time, if he acquit himself of gross negligence; but parties may make time the essence of the contract, so that if there be a default at the day, without proper excuse, or waiver afterwards, equity will not interfere.—*Morgan v. Bergen*, 3 Neb. 209.

[j] (Neb.) Parties to a contract for the sale of land may make time of its essence, by a distinct provision to that effect in the contract; and where they have done so a court of equity will refuse to enforce specific performance in favor of a party who has been in default, unless strict performance has been

waived.—(1874) *Morgan v. Bergen*, 3 Neb. 209; (1896) *Brown v. Ulrick*, 48 Neb. 409, 67 N. W. 168.

[k] (N. J. 1868) The owner of a large tract of land, which he was laying out and selling for house lots, gave a bond for a deed of one of these lots in which it was stipulated that, if the balance of the purchase money was not paid and certain improvements completed within a given time, the vendor might retain the land on paying back the amount received. *Held*, that time was of the essence of the contract, and that the vendee did not become entitled to a conveyance by performance of the stipulations after the time specified and after receiving notice from the vendor that he claimed the forfeiture.—*Grigg v. Landis*, 19 N. J. Eq. (4 C. E. Green) 350.

[l] (N. Y. 1837) Where the parties to a contract for the sale of real estate have made the time of performance essential, either party must have performed or tendered performance at the day, to entitle him to a decree of specific performance.—*Wells v. Smith*, 7 Paige, 22, 31 Am. Dec. 274.

[m] (N. Y. 1846) Where A. agreed with B. to rent him a store on his procuring C. as surety for the rent before a day certain, and B. failed to procure C. as surety before the time fixed, it was *held* that, as time was of the essence of the contract, B. was not entitled to a performance of A.'s contract, nor to the aid of a court of equity by injunction.—*Mitchell v. Wilson*, 4 Edw. Ch. 697.

[n] (N. Y. 1863) The time for performing a written contract for the sale of real estate is not important, where both parties have acquiesced in extending it.—*Schroeppel v. Hopper*, 40 Barb. 425.

[o] (N. Y. 1904) A contract for the sale of realty recited that it should be binding and in full force and effect up to and including a certain date, "after which date the same shall terminate and become void and of no effect whatsoever." Before this date it was accepted in writing by the proposed grantee, but nothing further was done by him. *Held*, that his assignee was not entitled to specific performance, time being of the essence of the contract.—*Blanchard v. Archer*, 87 N. Y. Supp. 665, 93 App. Div. 459.

[p] (Ohio, 1835) If the parties to an agreement stipulate that time shall be regarded as of the essence of the contract, a court of equity will not decree a specific performance in favor of one who has failed to fulfill his obligation at the time fixed.—*Scott v. Fields*, 7 Ohio (7 Ham.) 90, pt. 2.

[q] (S. C. 1830) Where a certain act is to be done by the complainant to complete the contract itself—as giving security within a fixed time—he will not be relieved against his failure to perform such act within the specified time.—*Doar v. Gibbes*, 1 Bailey, Eq. 371.

[r] (Vt. 1890) Where time is made of the essence of a contract, in the absence of any waiver of the requirement and of any excuse for delay, performance cannot be decreed.—*Sowles v. Hall*, 62 Vt. 247, 20 Atl. 810.

2. Payment.

[a] (U. S. 1853) Where a contract of sale provides that the same shall be void if the vendor does not pay the purchase money within a prescribed period, specific performance will not be decreed where payment is not made within such time.—*Vint v. King*, Fed. Cas. No. 16,950.

[aa] (U. S. 1901) A purchaser of real estate, who is required by the contract to deposit the price with a third party by a day certain, time being of the essence of the contract, is bound to pay in or tender the money within the time stated, to entitle him to enforce specific performance, notwithstanding the failure of the vendor to furnish an abstract of title within the time required by the contract.—*Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 109 Fed. 280, 48 C. C. A. 363.

[b] (Ark. 1904) Where, in a contract for the purchase of land, the vendees agree to pay the price at certain dates, the payment on those dates is not essential to their right to enforce specific performance.—*Vance v. Newman*, 80 S. W. 574.

[c] (Cal. 1890) A contract to convey land which provides for the payment of the purchase price within 60 days from its date, "otherwise this agreement to be null and void," clearly shows the intention of the parties to make time the essence of the contract; and the failure of the vendees or their assignee to make or tender payment within the specified time precludes them from

maintaining an action for the specific performance of the contract.—*Martin v. Morgan*, 87 Cal. 203, 25 Pac. 350.

[d] (Cal. 1891) Where a contract, sought to be specifically enforced, recites that, if plaintiff "fail to comply with any one of the agreements herein specified, and at the time specified, then this contract shall immediately become void," and defendant, in a letter extending the time for making the last payment under the contract, says that "time must be the special and essential ingredient in the extension, as it was intended to be in the original contract," the evidence is conclusive that time is of the essence of the contract.—*Bennett v. Hyde*, 92 Cal. 131, 28 Pac. 104.

[e] (Conn. 1870) A land contract, dated March 20th, provided that a deed should be given on payment of the purchase price, and that if the purchaser failed to take the deed within a year, he should forfeit what money he paid to bind the agreement. By a further clause it was agreed that at least \$25 should be paid on April 1st following. *Held*, that the time of payment of the \$25 was not of the essence of the contract, and hence a tender on April 2d was in time.—*Quinn v. Roath*, 37 Conn. 16.

[f] (Fla. 1896) Though time was not originally of the essence of a contract for the sale and purchase of land, if, after the vendee's default, the vendor notified him that payments should be made at the times specified, and the vendee agreed thereto, but subsequently defaulted, he was not entitled to specific performance.—*Asia v. Hiser*, 20 South. 796, 38 Fla. 71.

[g] (Ill. 1864) A contract for the sale of lands provided that unless two notes were paid at maturity, the time of their payment to be regarded as of the essence of the contract, the agreement should be void. The vendee paid one note at maturity, and tendered payment of the other six days after it fell due. *Held*, that he was not entitled to a decree of specific performance.—*Heckard v. Sayre*, 34 Ill. 142.

[h] (Iowa, 1845) Where a bond is given for title to land if the price is paid by a day certain, time is of the essence of the contract, and unless the money is paid at that day the vendee cannot enforce a specific performance, there being no obligation to pay the purchase money.—*Shuffleton v. Jenkins, Morris*, 427.

[i] (Iowa, 1857) Where a contract for the sale of real estate, after reciting the terms of the contract, provided: "That if the party of the second part [the vendee] shall fail to make any of the payments pursuant to this agreement, or otherwise break the same, then the said party of the first part [the vendor] shall be at liberty to consider the same forfeited on the part of the party of the second part, and the said party of the first part shall then, and in such case, have the right to enter in and upon the said premises in a quiet and peaceable manner." *Held*, that the parties had not expressly made time of the essence of the contract, and that something more than mere nonpayment by the vendee was required to forfeit the contract.—*Armstrong v. Pierson*, 5 Iowa (5 Clarke) 317.

[j] (Iowa, 1875) A contract for the sale of real estate, to be paid for in installments, at times fixed therein, stipulated that upon "failure or default, the times of the payments being of the essence of this contract," the obligor should have the right to terminate the contract. A day of payment falling upon Sunday, the obligee transmitted on Monday an amount \$3 less than the installment due, and the balance some days thereafter. *Held*, that after forfeiture for this breach a court of equity would not relieve the obligee.—*Iowa R. Land Co. v. Mickel*, 41 Iowa, 402.

[k] (Kan. 1878) The rule that a court of equity will not relieve from a forfeiture in case of a contract for the sale of land where time is expressly therein made of the essence thereof, notwithstanding hardship of forfeiture, applied where a railroad company sold to B., "for improvement and cultivation," 80 acres of land in Kansas, for \$120, whereon was a 3-foot vein of coal, which fact B. knew, but the company did not, and B. was prevented from seasonably making a payment, by reason of having sprained his foot while on a visit to Indiana, B. never having entered into possession or made any improvements, and the company tendering back the money it had received.—*Missouri River, Ft. S. & G. R. Co. v. Brickley*, 21 Kan. 275.

[l] (Ky. 1827) A. brought ejectment against B., the tenant in possession, and C. was admitted to defend. A. and C. compromised the matter. C. withdrew his defense, permitted judgment to be entered for A., and gave his notes to A. in payment for the land, and signed an agreement that, if the money was not paid, A. should again take possession, "when there should be no bar whatever"; A. agreeing to convey on payment. Before the notes became due, A. assigned them to D. C. failed to pay when the notes became due, and was lulled into security in his negotiations with A. as to the authentication of the deeds, and received no notice of the assignment of the notes until after they fell due, and, having tendered the money to A. and D., brought his bill for specific performance. *Held*, that as the stipulation, as to the writ of possession without bar, in case of default of payment, was intended only as security for payment, specific performance was decreed with costs.—*Kercheval v. Swope*, 22 Ky. (6 T. B. Mon.) 362.

[m] (Ky. 1868) Where the payment of the price on a particular day was a condition precedent to the conveyance and surrender of the possession of the land sold, time was *held* to be of the essence of the contract; and the personal representatives of the purchaser, he having died just before the day to pay arrived, were not allowed to have specific performance, payment not having been tendered on that day.—*Jones v. Noble*, 66 Ky. (3 Bush) 694.

[n] (Ky. 1888) An agreement was executed by the wife only, that if her husband would pay a certain sum on a mortgage debt on the day it became due, she would convey to him a part of the land mortgaged. *Held*, that time was of the essence, and the failure of the husband to pay the money on the day specified deprived him of the right to enforce it.—*Stembridge v. Stembridge's Adm'r*, 87 Ky. 91, 7 S. W. 611.

[o] (Ky. 1892) Where a contract for the sale of land provided that part of the price should be paid in cash, and the residue in future installments, \$100 being paid at the time of its execution, time was not of the essence of the contract, and the vendee was entitled to a reasonable time in which to make the balance of the cash payment; and, where he commenced suit to enforce the contract within 10 days from its date, it was within reasonable time.—*Tyler v. Onzts*, 93 Ky. 331, 20 S. W. 256.

[p] (Mich. 1875) Where a land contract provides for the payment of part of the consideration by conveying other land described free and unincumbered within a year, or in lieu thereof \$800 with interest, the time limited is not so far of the essence of the contract that it may not be waived; and, if waived, the right to pay by conveying the land within a reasonable time is within the protection of a court of equity, though not renewed by a written agreement.—*Kimball v. Goodburn*, 32 Mich. 10.

[q] (Neb. 1888) May 8, 1886, T., by written contract, sold to L. a land contract for land held by T. from a land grant railroad company, for \$1,200; L. paying \$456 down in cash, and the note of another person which was received as cash, and agreeing to pay, on or before July 1st, the balance of \$750, and "the balance of full payment in one year after June 1, 1886, with interest at 10 per cent. per annum." The writing contained the following clause: "And this contract is to be construed strictly as to payments." No payment was made July 1st. July 6th, T. notified L. by letter of the cancellation of the contract, and returned the note received in the first payment. July 10th, L. tendered to T. the amount of the July payment, with \$6 to cover interest, etc. In an action by L. against T. for specific performance, *held*, that time was not of the essence of the contract; and, in view of the fact that she relied on the sale of certain cattle to make the payment, and in fact obtained an advance on them for that purpose, L. had not been guilty of gross negligence.—*Langen v. Thummel*, 24 Neb. 265, 38 N. W. 782.

[r] (Neb. 1889) July 31, 1886, G. purchased from T. a city lot, and took a receipt for \$50 advanced as part payment of the price, which was \$1,800, the terms being that \$1,000 in cash should be paid on delivery of a deed, G. to assume a mortgage of \$750; the receipt stipulating that "if final payment is not made within twenty days all rights are to be forfeited." Possession was not taken by G. At the end of the 20 days, T. tendered G. a deed, and demanded payment, which was refused, the reason assigned being that on C.

had begun suit against T. to enforce a contract of sale made August 9th, following the date of G.'s contract, but which sale was shown to have been made by an agent, without authority, as G. knew. June 23, 1887, G. filed his answer and cross-bill in the suit of C. against T., by which he sought specific performance, and conveyance. Meantime the property had greatly increased in value, owing to the construction of a cable road in an adjoining street. *Held*, that time was of the essence of the contract, and that G. could not enforce it.—*Cannfield v. Tillotson*, 25 Neb. 857, 41 N. W. 812.

[s] (N. Y. 1844) A. agreed to sell land to B. for \$300, one-third thereof to be paid down, and the residue in two equal annual payments with interest, B. to have possession immediately. The agreement contained a provision that in default of either of the payments A. should be discharged from his contract, and B. forfeit the payments already made by him, and deliver up the possession of the premises to A. B. made valuable improvements on the land, paid the first two installments of the purchase money at the times specified in the contract, and assigned his contract to C., who took possession, but did not make payment of the last installment on the day it fell due, nor was he called on for it, nor a deed offered to him of the land. A few days afterwards he tendered the money and demanded a deed, which A. refused, and insisted upon a forfeiture. On a bill filed by C., against A., it was *held* that time was not of the essence of the contract, and that C. was entitled to a specific performance of the contract.—*Edgerton v. Peckham*, 11 Paige, 352.

[t] (N. Y. 1874) Where a lease contains an option to the lessee to purchase on or before a certain day, on payment of a specified sum, time is of the essence of the contract, and unless the lessee is ready with the money on the day named, the contract is forfeited.—*Codding v. Wamsley*, 4 Thomp. & C. 49.

[u] (N. Y. 1887) Where in a land contract there was a clause forfeiting the money paid if performance was not tendered on the date specified, and the purchaser was notified at the time the contract was made, and several times thereafter, that performance on the date would be demanded, time was of the essence of the contract, and the purchaser, not being ready with his money, as agreed, is not entitled to specific performance.—*Baumann v. Pinkney*, 8 N. Y. St. Rep. 370.

[v] (N. Y. 1889) The terms of an executor's sale required the payment of 10 per cent. of the price forthwith after the sale, the balance on a later named day, "when the deed will be ready for delivery." The vendor was relieved from the necessity of giving notice, and the purchaser was to pay interest if he neglected to call for the deed. If the purchaser failed to comply with the terms, the property was to be resold; he being held liable for any deficiency in the proceeds. A purchaser of vacant lots paid 10 per cent. of the purchase money, and elected to give a bond and mortgage for 70 per cent. on delivery of the deed. He objected to giving a mortgage with an insurance clause, as provided by the terms of sale, and several months after brought suit for specific performance. *Held*, that time was not of the essence of the contract, and, although the lots had appreciated in value, plaintiff was entitled to a conveyance on execution of the bond and mortgage.—*Day v. Hunt*, 112 N. Y. 191, 19 N. E. 414.

[w] (Or. 1875) Where, by the express terms of a contract for the sale of real estate, it is apparent that it was understood between the parties that the deferred payments should be promptly made at the times specified in the agreement, a court of equity will treat time as of the essence of the contract.—*Snider v. Lehnher*, 5 Or. 385.

[x] (Pa. 1819) A vendor of land covenanted to convey to the vendee, on payment of the purchase money, payable in installments at specified times. Some of the installments were paid, and after the last became due, it was agreed by the parties that, if the residue should not be paid by a certain day named, the payments then made should be forfeited, and the original bargain at an end. *Held*, that this subsequent arrangement gave the vendor no additional right to rescind in case payment should not be made at the time stipulated.—*Decamp v. Feay*, 5 Serg. & R. 323, 9 Am. Dec. 372.

[y] (Pa. 1839) Parties contracting for the purchase and sale of land may make the time of payment of the purchase money essential to the contract, so

that if the money be not paid at the times stipulated the contract shall be null and void, and the purchaser cannot compel its specific execution, although previously in part performed.—*Dauchy v. Pond*, 9 Watts, 49.

[z] (Vt. 1890) Defendant, having furnished the money to redeem certain lands, took the conveyance in his own name, and executed a written agreement to the redemptioner to deed the same to him on receipt of a certain sum "at any time prior to January 1, 1888," and providing that unless the tender of such sum was made on or before the day named the agreement should be absolutely null and void. *Held*, that time was of the essence of the contract, and having failed to tender the agreed amount within the time limited, the redemption was not entitled to specific performance.—*Sowles v. Hall*, 62 Vt. 247, 20 Atl. 810.

[zz] (Wis. 1856) Where a contract for the conveyance of land makes payment of the money at the time fixed by the contract a material and essential part thereof, a default in payment will defeat the right of the grantee to enforce the specific performance of the contract.—*Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57.

3. Matters to be Performed by Vendor.

[a] (Ill. 1882) A contract for the purchase of real estate provided that, if the vendor failed to perfect the title within nine months, the purchaser might perfect it at the expense of the former, or might, at his election, reconvey and receive back the consideration. *Held*, that time was of the essence of this part of the contract and that specific performance would not be decreed against the purchaser when the vendor had not perfected his title within the time named, although he did so afterwards.—*Lowery v. Nicolls*, 11 Ill. App. (11 Bradw.) 450.

[b] (Ill. 1899) A contract, of which time was of the essence, was for the transfer of land subject to mortgages, and the grantor was to repay taxes paid on the property to be taken in exchange; but, when he tendered the deed, more than a year's interest due at the time of making the contract was not paid, nor did he offer to repay the taxes which had been paid by the purchaser. *Held*, that equity would not enforce specific performance, though the interest was afterwards paid.—*Skeen v. Patterson*, 54 N. E. 196, 180 Ill. 289.

128 Fed. 847.)

TREAT v. RUSSELL et ux.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1904.)

No. 1,910.

1. CANCELLATION OF DEED—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* insufficient to warrant the cancellation of a deed conveying an undivided interest in a tract of land for fraud, under the rule that in such cases the proof of fraud must be clear, satisfactory, and convincing, where complainants admitted their signatures to the deed, which was formally executed and acknowledged, duly recorded, and remained unchallenged for more than four years, during all of which time the conduct of the parties was consistent with a joint ownership of the land, and in some respects inconsistent with its sole ownership by complainants.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This action was brought by James M. Russell and Minnie A. Russell, his wife, who are the appellees in this court, against Thomas C. Treat, the appellant, to cancel and annul a deed conveying a two-thirds interest in a tract of land situated in Platte county, Mo., containing altogether about 340 acres.

The deed in question purported to be one executed by the appellees, as grantors, in favor of the appellant, as grantee, on April 4, 1896, and to have been acknowledged on the same day before Thomas A. Moxcey, a notary public, and to have been duly recorded in the proper office on May 27, 1896. The appellees, hereafter termed the "complainants," sought to have this deed canceled and annulled, because, as they alleged in their bill, they never did at any time sell or convey, or undertake to sell or convey, to the appellant, hereafter termed the "defendant," an undivided two-thirds interest in the land in controversy. They averred that if the complainants, or either of them, ever appended their signature to the deed in question they were induced to do so by some scheme, trick, device, or fraud which the defendant practiced to obtain such signatures, which scheme, trick, device, or fraud, as they alleged, they could not define or describe otherwise than by saying that the defendant had presented to them the deed in question and had induced them to sign it by representing to them that it was an instrument other and different from the pretended deed, doing so with intent to deceive and to defraud them. They further averred that the defendant signed, or caused some other person to sign, their names to the deed without their knowledge or consent. After the foregoing allegations the complainants alleged that they did not know in which of the two ways last mentioned the signatures of the complainants appearing on the deed had been secured, but that they were secured in one or the other of these ways, and, as they believed, in the latter way; that is to say, by forgery. The defendant answered the bill by denying each and all of the foregoing charges of fraud and forgery. He further alleged that James M. Russell, one of the appellees, acquired a title to the tract of land in controversy in the month of January, 1896; that the conveyance of the title to said Russell was made pursuant to a prior agreement between Russell and one Clark W. Drummond, who was at the time a partner of Treat, whereby said Russell, Drummond, and the defendant, Treat, had mutually agreed to purchase the land from the former owner on joint account, each of the purchasers to have an undivided one-third interest therein; that pursuant to said agreement the title to the land, when purchased, was vested in Russell temporarily, the understanding being that he would convey to each of his associates an undivided one-third interest therein when requested to do so; that under said agreement for the purchase of the land in question the defendant and said Drummond conducted all of the negotiations leading up to the purchase of the land from the former owner, and also negotiated a loan secured by a mortgage on the land, whereby the purchase price was paid; that when the purchase was consummated the conveyance was made to Russell pursuant to the aforesaid agreement; that subsequently the defendant acquired Drummond's one-third interest in the property, and that on April 4, 1896, Russell and wife conveyed to the defendant a two-thirds interest in the land, as he had previously undertaken to do; that this deed was duly acknowledged and recorded, and is the identical instrument which the complainants charge to have been obtained from them by means of fraud or forgery. The defendant also filed a cross-bill seeking an accounting as between himself and the complainants respecting the land and their dealings in connection therewith and certain affirmative relief. The case was removed from the state court, where the bill was originally filed, and after its removal to the federal Circuit Court was referred to a special master to take the testimony, who was also empowered to "examine the evidence and make findings of fact." The master subsequently filed a report, in which he found adversely to the complainants as respects all the charges of fraud and forgery. Exceptions having been filed to this report, the Circuit Court reversed the findings of the master, holding that the deed in question had been obtained fraudulently and deceitfully, and in accordance with that finding it canceled and annulled the conveyance. The case is before this court on an appeal taken by the defendant from such decree.

C. A. Mosman (Thomas F. Ryan and S. K. Woodworth, on the brief), for appellant.

James W. Boyd, for appellees.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The allegation which is contained in the bill that the signatures of the complainants to the deed of date April 4, 1896, which the complainants seek to have canceled, were forged—that is to say, that they were written by the defendant himself, or by some one else whom he had caused or procured to write them, without the knowledge or consent of the complainants—may be ignored, since the complainants, in the course of the trial, practically admitted that the deed bore their genuine signatures when it was exhibited to them, although they professed ignorance as to the manner in which their signatures had been obtained, and also stoutly denied that they had ever consciously signed the deed in question intending to convey to the defendant a two-thirds interest in the land in controversy. Both of the complainants gave evidence tending to show that on one occasion, on or about March 10, 1896, at the request of the defendant, they had appended their names to an instrument of which they could give no better description than that it was “a blank paper that had some printed matter on it, something in the form of a deed or something like that, the size of that paper there” (indicating the deed of April 4, 1896). According to their statements respecting this incident, they went to the defendant’s office in Atchison, Kan., on or about March 10, 1896, to execute a deed of trust on the land in question to secure the payment of a note in the sum of \$5,000, which was given to an insurance company for money borrowed to purchase the land from the former owner. After the deed of trust was signed, the defendant said (according to the complainants’ testimony):

“Here, just sign this paper, and I can fill it out afterwards. You can go on to dinner. This does not amount to much anyhow, and I can fill it out afterwards. And we signed the paper, and started out of his office door, and he went out with us, and took a paper in his hand. I don’t know what paper it was. And he carried it in, and turned on the left, and stopped at an office there—Mr. Solomon’s office—and come on out, and we went on down the elevator together, and my wife and me went to dinner to a restaurant, and I don’t think we went back in the office that evening. We went home.”

The theory of the complainants, to account for their signatures to the deed of April 4, 1896, appears to be that this blank paper which they claim to have signed on the occasion in question without examination, and on the strength of the foregoing representation, was in fact the deed of date April 4, 1896, which they seek to have canceled, and that it was subsequently filled out by the defendant, and a certificate of acknowledgment appended thereto by the notary at the defendant’s request, with intent on the defendant’s part to defraud them. The charge that their signatures were forged being abandoned, and the fact being admitted that the deed bears their genuine signatures, there is no evidence in the record, so far as we can discover, that their signatures to the deed were obtained through any trick or artifice of a fraudulent character unless it be that on or about the date last mentioned the defendant did obtain their signatures to a blank deed in the manner last described with intent to perpetrate a fraud.

This, then, would seem to be the principal question of fact in the case: Were the signatures of the complainants obtained to a blank instrument in virtue of a representation that it was of no consequence, or words to that effect? Unless this question is answered in the affirmative, it would seem that the genuine character of the deed has not been impeached, and that it cannot be annulled in virtue of any of the averments which are contained in the bill. Before considering this issue of fact, it is deemed advisable to state some general facts and circumstances, concerning which there is no controversy, which will serve to show the situation and relation of the parties to each other at and previous to March 10, 1896. The land in controversy originally belonged to and the title was vested in persons who resided in the state of Indiana. In 1890 or in 1891 Russell rented the land from the owners for agricultural purposes, and continued to reside on it as a tenant from that time forward until 1895 and thereafter until this action was brought. On or about August 3, 1895, he entered into an agreement with the owners of the land for its purchase at the price of \$5,400 in the aggregate, or at the rate of \$16 per acre. Of this sum \$800 was to be paid in cash, and the balance in five equal annual installments, that were to be secured by a mortgage on the land. There was some delay in carrying out the agreement, and before the contract of sale was executed by the delivery of the deed Russell negotiated a sale of the land to one Smith at the price of \$18 or \$20 per acre. This agreement with Smith appears to have been made in the month of November, 1895. Smith was to pay the entire purchase price in cash. To enable him to buy the land, Smith tried to negotiate a loan through the defendant, Treat, and his partner, Drummond, who resided at Atchison, Kan., and were engaged in negotiating loans upon real property for a commission. An arrangement was entered into by Smith with Treat and Drummond in virtue of which they agreed to join with Smith in making the purchase. By the terms of this agreement the land, when conveyed, was to be deeded to Smith, who was to execute a mortgage upon the land for the purchase money, but the property, when bought, was to be held by him for the benefit of himself, his son, and Treat and Drummond, each to be entitled to an undivided one-third interest therein. This arrangement, however, with Smith, was not carried out, because Treat and Drummond failed to obtain a loan on the property for such a sum as was needed to pay for the property at the price of \$20 per acre. Smith having failed to raise the money to purchase the land from Russell, Russell himself applied to Treat and Drummond to negotiate a loan on the property in the sum of \$5,000 to enable him to carry out his contract for the purchase of the land which had not at that time been executed.

Up to this point there is no substantial controversy between the parties concerning any of the material facts, but here there is a conflict as to what occurred. Russell contends, in substance, that he never agreed with Treat and Drummond to purchase the land jointly with them, and that he simply employed them as brokers to negotiate a loan in his behalf, while Treat insists that when Russell applied to them to obtain a loan on the property in the sum of \$5,000

he and his partner entered into a verbal agreement with Russell of substantially the same character as that which they had previously had with Smith, namely, that they would unite with him in purchasing the property on joint account, and would endeavor to raise the money wherewith to purchase the land by negotiating a sale of a mortgage on the property in the sum of \$5,000, which mortgage should be executed by Russell. The defendant produced much testimony which tended to show that a verbal agreement substantially like that which is set forth above in the statement, was entered into between himself and Drummond on the one hand with Russell on the other for the joint purchase of the land, in pursuance of which a mortgage on the property was executed by Russell and negotiated by Treat and Drummond; that the purchase money to the amount of \$5,000 was thus secured and paid to the former owner of the land; and that the property was thereupon conveyed to Russell in January, 1896, he agreeing to convey to Treat and Drummond an undivided two-thirds interest therein when requested to do so, which conveyance he and his wife subsequently executed and acknowledged on April 4, 1896.

Recurring to the principal issue of fact which is stated above, it is to be observed that no witness in the case besides the complainant and his wife gave testimony tending to show that either on March 10, 1896, or at any other date prior to April 4, 1896, they were requested by the defendant to sign a blank instrument resembling a deed, and that they did sign such an instrument pursuant to such request. This incident which the complainants relate, so far as the record discloses, was witnessed by no other person, and it is the only explanation which they seem able to give of the manner in which their genuine signatures to the deed of April 4, 1896, could have been obtained. The testimony of the defendant in relation to this incident is very positive, and to the effect that the only instrument which the complainants signed on March 10, 1896, was a deed of trust on the property in dispute securing the loan for \$5,000, with which the property was purchased, and possibly an order directing how the money, when obtained, should be expended, and that neither on that occasion nor any other were the complainants requested to sign any blank paper resembling a deed or any other instrument. The defendant's testimony is equally positive to the effect that the deed of April 4, 1896, was signed and acknowledged on that day in his office, and not on March 10, 1896, both of the complainants being at the time present, and fully conscious of its contents and what they were doing. The defendant's statement in this latter respect is fully corroborated by the notary public before whom the deed of April 4, 1896, was acknowledged, who claims to have a distinct recollection of meeting both of the complainants in the defendant's office on that day, of their signing the deed in his presence and acknowledging it before him. The notary is himself corroborated by the official record of his proceedings on that day, which he was required to keep. This record shows the acknowledgment of the deed in question on April 4, 1896, and, while the notary was unable, on his examination, to say definitely whether he asked the complainants if they knew what was

in the deed, or told them what was in it, at the time he took their acknowledgment, yet that it was safe to say that he did the one thing or the other. Moreover, the presumption that the complainants were acquainted with the contents of the deed, and signed it with a full understanding of its contents, is created by the notarial certificate of acknowledgment, which presumption, if not conclusive, is entitled to great weight, the certificate being an official record, and it cannot be overcome at this late day without the clearest and most convincing evidence of fraud.

The record discloses other facts which support the contention of the defendant that the deed of April 4, 1896, was consciously executed by the complainants in pursuance of a verbal agreement made with Treat and Drummond prior to the negotiation of the loan for \$5,000 that the land in controversy should be purchased on joint account, and that Treat and Drummond should have a two-thirds interest in the property when it was acquired. For more than four years subsequent to April 4, 1896, the defendant, Treat, frequently visited the land on which the complainants were residing, and conferred with Russell about the management of the place, the execution of leases for parts of the land, and other matters which would naturally interest one who had a proprietary interest in the property. He also advanced and paid interest on the outstanding loan when Russell was unable to do so, and also paid taxes upon the property when they became in arrear. The money so advanced by the defendant from time to time amounted to a sum exceeding \$700. Russell never seems to have resented such interference with his affairs, but for several years conferred with the defendant freely, and accepted assistance and advice from him precisely as one would be expected to confer with and seek assistance from another who was interested with him in a joint venture. In a word, the actions of the parties subsequent to April 4, 1896, are consistent with the theory that the defendant had a proprietary interest in the property, and entirely inconsistent with the view that his interest was merely that of a broker who had once negotiated a mortgage on the land, and was only interested in seeing that the interest on the loan was paid, and that the mortgage was not foreclosed. Besides, on May 4, and again on May 13, 1901, after difficulties had arisen between the parties, the complainants entered into written agreements with the defendant concerning the future management and control of the land, which agreements almost in their opening paragraphs contained a recital to the following effect:

"That whereas the said parties hereto are owners, and have been for the past five years, of three hundred and forty acres of land situated in sections fourteen and fifteen and twenty-three in township fifty-four, range thirty-seven, Platte county, Missouri," etc.

On May 13, 1901, the complainants also executed a deed of trust covering the property in controversy to one Holbert to secure a note which they had executed in the sum of \$335, in which deed of trust they described their interest in the land as being "an undivided one-third interest." Some time afterwards, and in the month of August, 1901, complainant and his wife also entered into an agree-

ment with the defendant for the arbitration of certain differences which had arisen between them, and which seem to have grown in part out of the contract of May 13, 1901, heretofore mentioned. This agreement of arbitration also begins with the following recital, to wit:

"Whereas T. C. Treat is and has been for more than five years past the owner of an undivided two-thirds interest in three hundred and forty acres of land in sections fourteen, fifteen and twenty-three in township fifty-four, range thirty-seven, Platte county, Missouri, and J. M. Russell is the owner of the undivided one-third thereof. * * * now, therefore, it is agreed that S. J. Blythe, John Page and William Reece be and they are hereby appointed and agreed upon to go through the accounts of each and both of said parties," etc.

The complainants say, in substance, that they signed these several written documents, being at the time ignorant or unconscious of the recitals which they contained, and with respect to the contract of May 13, 1901, containing the above-quoted recital as to the ownership of the land, they allege that their signatures thereto were obtained by the false representation of the defendant that it was merely a mortgage on the crops and produce of the land, given to secure the payment of the sum of about \$700, which the complainants admit that they then owed to the defendant for money theretofore advanced by him for their benefit in keeping down the interest on the mortgage. It is therefore urged in their behalf that, as they were not aware of the recitals, they do not serve to estop the complainants from denying that the defendant is a joint owner of the property, and that they should not even be regarded as admissions or evidence of such joint ownership. But we have not been able to adopt this view of the case. The complainants were able to read and write, and they seem to possess the average intelligence of persons in their station in life. They had full opportunity to read the instruments containing the aforesaid recitals before signing them, and, as certain disputes had already arisen between themselves and the defendant before the several documents were prepared for signature, we find ourselves wholly unable to credit the statement that they signed the instruments in question without being aware of the admissions which they contained. Moreover, even if we were able to believe that the several documents were signed by the complainants without reading them, and in ignorance of the recitals, yet the law would not excuse them for their negligence in signing written agreements of such importance as these appear to have been without taking the pains to read them and to ascertain what statements they contained and what obligations they imposed. Enough friction already existed between the parties when the documents were executed. Their relations at the time had become so far strained that the complainants should have read these several instruments carefully before executing them, and we feel constrained to believe that they did examine them, or at least that they had a fair understanding of their contents, before they executed them. No other conclusion than this seems to be admissible in view of all the facts and circumstances of the case.

In addition to the recitals last mentioned, the record also contains evidence of oral statements made to at least five different per-

sons at various times by the complainant Russell, which statements are in the nature of admissions that defendant was a joint owner of the land in controversy.

The learned judge of the trial court seems to have been largely influenced to his decision that the deed of April 4, 1896, was obtained fraudulently and deceitfully by the thought that the oral agreement in virtue of which the land was bought and in execution of which the deed was made and delivered was an unconscionable agreement, according to the testimony of the defendant, in that it imposed an excessive burden upon the complainant Russell, and that it ought not to be given effect for that reason. We entirely agree with the view that the contract in question did impose on the complainant Russell what seems now to have been an undue burden in that it obligated him to till the land when it was bought, or to see that it was properly tilled, and to apply the rents and profits to the extinguishment of the mortgage indebtedness, which, when extinguished, would make him the owner of only a one-third interest in the land, while the defendant would become the owner of the remaining two-thirds. In view of this outcome, the bargain as made, seems, at the present time, to have been unfair. We conceive, however, that Russell's desire to obtain at least one-third of the land at the time the bargain was made may have been so strong, and the difficulties which stood in the way of his obtaining the necessary funds to buy the entire tract may have been so great, that he was entirely willing to enter into the contract with the defendant for a joint purchase. He may have perceived, or at least thought that he perceived, some peculiar advantage to himself in allying himself with the defendant in making the purchase on the terms proposed. It may have seemed the only way open to him at the time of becoming the owner of a part of the land, and he may have been willing to assume the burden which the contract imposed to accomplish that end. At all events, in view of the situation of the complainants at the time the agreement was entered into and the motives which may have actuated them at the time, it does not appear to us that the bargain was so unreasonable or unconscionable as to justify the inference that it was never made, and that the deed of April 4, 1896, was not consciously executed by the complainants, but was obtained through some trick or artifice, and is therefore fraudulent. This being a proceeding, so far as the complainants are concerned, to set aside a deed bearing their genuine signatures, solely on the ground that it was procured through some trick or artifice, which deed, on its face, appears to have been formally executed, and to have been duly recorded in the proper office very shortly after it was executed, and to have remained unchallenged by any one for at least four years, and the rule being, in this class of cases, that to warrant a court of equity in setting such a conveyance aside the proof of the alleged fraud must be clear, satisfactory, and convincing to the mind of the chancellor (*Atlantic Delaine Co. v. James*, 94 U. S. 207, 214, 24 L. Ed. 112; *Forrester v. Scoville*, 51 Mo. 268; *Jackson v. Wood*, 88 Mo. 76; *Hupsch v. Resch*, 45 N. J. Eq. 662, 18 Atl. 372; *Pomeroy's Eq. Jur.* vol. 2, § 859), we have little hesitation in holding that on the proof contained in this record the

deed of April 4, 1896, ought not to be set aside. In view of what has already been said concerning the character of the evidence, it is obvious that the proof which was relied upon by the complainants to obtain the cancellation of the deed is neither clear, satisfactory, nor convincing. Indeed, it does not seem to preponderate in their favor. It results from this conclusion that the relief prayed for by the complainants in their bill ought not to have been granted, and that the decree of the lower court was erroneous.

We have next to consider and determine what action shall be taken on the defendant's cross-bill, to which reference has already been made in the foregoing statement. By the terms of the decree which was entered in the lower court, the cross-bill was dismissed. This cross-bill appears to have been filed by the defendant mainly with a view of obtaining a receiver of the property while the litigation concerning the ownership thereof was in progress, and incidentally to obtain an accounting of the rents, issues, and products of the land which had been received by the complainant Russell during the years 1896 to 1901, both inclusive. The special master to whom the case was referred esteemed it his duty, as it seems, to take an account as prayed for in the cross-bill, the result being that he reported that the complainant Russell was indebted to the defendant in the sum of about \$323.54. The trial court, on entering its decree, observed, however, that no such matter as taking an account between the parties was referred to the master, the reference being only with respect to the issues raised by the original bill and the answer thereto. The order of reference seems to justify this conclusion, since no mention was made therein of the issues presented by the cross-bill. Moreover, the trial before the master seems to have proceeded on the theory that the issue which he was to determine was that as respects the validity of the deed of April 4, 1896, and very little attention was paid by the complainants to the introduction of testimony relating to the accounting. For these reasons the evidence which is contained in the present record is insufficient, in our judgment, to state the account accurately with due regard to the rights of the complainants. It is also probable that crops have been grown on the land since this litigation has been pending, concerning which a further accounting must, in any event, be had.

For these reasons the decree below will be reversed and annulled, and the case will be remanded to the lower court, with directions to order another reference either to the former master or to another master to be selected by the court, for the purpose of restating the account between the parties, if it so happen that they are unable to state the account themselves, and to receive such further testimony on that head as the parties may desire to introduce. Such restatement of the account will proceed upon the theory that the deed of April 4, 1896, is a valid conveyance, and that the defendant, Treat, since the date of that conveyance, has been the owner of an undivided two-thirds interest in the land in controversy, and that the net sum realized from the rents and profits of the land in controversy, including that part thereof which may have been tilled by Russell himself, should have been applied to the payment of the mortgages on

the land and the taxes against the same from and after April 4, 1896. In stating the account the complainant Russell should be allowed credit for all permanent improvements made on the land in the meantime at his own cost and expense. The master reports "that there was no agreement among the parties as to each supposed tenant in common not charging for work in connection with this land until May 4, 1901." In view of this finding, the master will be at liberty to find and state in his report what would be a reasonable compensation for the work and labor performed and the services rendered by the complainant Russell from April 4, 1896, to May 4, 1901, in caring for, managing, and supervising the joint property during that period; but the question whether the complainant should be allowed such compensation as against the defendant will be reserved for future consideration and determination on the coming in of such report.

The decree below is accordingly reversed, and the cause is remanded to the lower court, with directions substantially as indicated in the preceding paragraph.

(128 Fed. 856.)

THE TROOP.

KENNEY et al. v. LOUIE.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1904.)

No. 939.

1. SEAMEN—INJURY IN SERVICE—LIABILITY OF SHIP FOR FAILURE TO GIVE PROPER CARE.

Under the general maritime law, as recognized and administered by the admiralty courts of the United States, a seaman may maintain a suit in rem to recover damages caused by the failure of a master to furnish him with proper care, treatment, and supplies after his accidental injury in the service of the ship—the duty being one which rests upon the ship in respect to which the master represents the owners; and neither the British admiralty decisions, nor the English 'merchants' shipping act, deny such right, although in matters relating to the navigation of the ship the English decisions treat the master and crew as fellow servants.

2. SAME—JURISDICTION TO ENFORCE LIABILITY—FOREIGN SHIP.

An American court of admiralty may, in its discretion, entertain jurisdiction of a suit by an alien seaman against a foreign ship to recover damages for the gross negligence or misconduct of the master, in failing to furnish libellant proper care, nursing, and medical treatment after his accidental injury while in the service of the ship; and the assumption of such jurisdiction will not be held an abuse of discretion by an appellate court, where the circumstances were such that otherwise the libellant, who was left in this country, permanently injured, and without money, would probably have been without any effective remedy.

3. SAME—GROUNDS OF RECOVERY—DAMAGES.

A decree affirmed which awarded a seaman \$4,000 damages against a ship on the ground of the gross negligence of the master in failing to furnish libellant proper care and medical attendance after his accidental injury in the service of the ship, by reason of which he suffered greatly and was permanently crippled.

Ross, Circuit Judge, dissenting.

¶ 1. See Seamen, vol. 43, Cent. Dig. §§ 39, 187.

Appeal from the District Court of the United States for the Western Division of the District of Washington.

For opinion below, see 118 Fed. 769.

J. M. Ashton and W. L. Sachse, for appellants.

A. W. Buddress, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On July 7, 1901, at Philadelphia, the appellee, a subject of the German Empire, shipped on board the British ship Troop as an able-bodied seaman, for the period of three years. On the morning of January 16, 1902, the said ship left the inner port of Fusan, Korea, on a voyage to Puget Sound. At about 2 o'clock in the afternoon of that day the appellee, while at work on one of the upper yardarms of the ship, lost his footing and fell, thereby sustaining severe injuries; his right leg being broken near the thigh, and his left arm being broken between the elbow and the wrist. The weather was calm and the ship was making no headway. Instead of sending the appellee back to the hospital at Fusan, a distance of six or seven miles, the master of the ship, with the assistance of the steward, set the appellee's broken leg and arm, and had him carried to his bunk in the forecastle. There he remained until February 26th, when he was placed on a tug and taken to a hospital at Port Townsend; the ship having arrived at Port Angeles on February 21st. The appellee libeled the ship for damages; alleging that the master negligently failed to take him back to the port of Fusan and to place him in a hospital there, and that he wrongfully and negligently and unskillfully set his fractured leg and arm, and that the master was negligent in not paying further attention to him thereafter, and in not sending him to a hospital on arriving at Port Angeles.

The appellant A. F. Kenney, the master of the ship, made claim for the same, and answered the libel, denying the allegations of negligence, and averring that the ship was a British ship, and that under the laws of Great Britain the master and the appellee were fellow servants; that the neglect, if any there were, to furnish proper medical treatment, was the neglect of the master, a fellow servant, for which neither the ship nor her owners were responsible. The proof offered on the trial to sustain this allegation concerning the British law was sections 92 to 266, inclusive, of the merchants' shipping act of 1894. No testimony was taken of counsel learned in the British admiralty law, and no other proof was offered than a printed volume purporting to contain the act aforesaid. The court entered a decree for the libellant and against the ship for the sum of \$4,000.

Concerning the law of the case on the appeal, the appellants principally rely on two propositions: First, that by the decision of the Supreme Court of the United States in the case of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, a doctrine has been announced which denies the right of a seaman to pursue a vessel in rem for injury occasioned by the neglect of the master to furnish him proper medical treatment when sick or injured in the service of the vessel; and, second, that, whatever may be the established rule upon

that subject in the United States, the admiralty law of England, by which the present case is to be governed, recognizes no such lien. In the case of *The Osceola* the Supreme Court answered two questions which had been certified to it from the Circuit Court of Appeals for the Seventh Circuit, which, condensed into one, were, in substance, whether a vessel was liable in rem to a member of the crew for injury resulting from the improvident and negligent order of the master, in directing that the gangway be unshipped while the vessel was at sea, running against the wind. The appellants rely on the language of the opinion, where it is said, "The statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew; but in all but a few of the more recent cases the analogies of the English and Continental codes have been followed, and the recovery limited to the wages and expenses of maintenance and cure"—and upon the final proposition announced in the opinion at page 175, 189 U. S., page 487, 23 Sup. Ct. 47 L. Ed. 760, "that the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident." These observations of the court are general in their terms, but it must be remembered that they were directed solely to the questions certified to it for decision. The inquiry concerned the liability of the ship to a member of her crew for injuries received through a negligent order of the master, made while navigating the ship. It is not implied in the language so used, nor is it to be presumed therefrom, that the court intended to establish a rule narrower than that recognized by the more recent decisions of the federal courts, that the master and the crew are fellow servants only as to matters connected with the navigation of the ship, but that the master of a ship at sea represents the owners in respect to the personal duties and obligations which they owe the seamen. *Olson v. Oregon Ry. & Nav. Co.* (D. C.) 96 Fed. 111, affirmed in 104 Fed. 574, 44 C. C. A. 51; *City of Norwalk* (D. C.) 55 Fed. 98; *Gabrielson v. Waydell* (C. C.) 67 Fed. 342. Nor is it to be presumed that the learned justice who delivered the opinion of the court intended to discredit the views theretofore expressed by him in *The J. F. Card* (D. C.) 43 Fed. 92, where, in discussing the obligation of the ship to care for and cure sick and injured seamen, he said, "Of course, if there be any negligence or misconduct on the part of the officers of the vessel, this would furnish a separate ground for action, in which the seaman would recover not only his expenses for medical attendance, etc., but compensation for his personal injuries, as in ordinary cases of negligence;" nor is it, we submit, to be presumed that it was the intention of the court to overrule, without referring thereto, a long line of American decisions in which it has been uniformly held for nearly a century that a seaman injured while in the service of his ship is entitled to proper care and medical attention at the expense of the ship, and that, if this be neglected, the ship may be held in consequential damages. *Brown v. Overton*, 4 Spr. 462, Fed. Cas. No. 2,024; *The Chandos* (D. C.) 4 Fed. 645; *The City of Alexandria*

(D. C.) 17 Fed. 390; *The Vigilant* (D. C.) 30 Fed. 288; *The J. F. Card* (D. C.) 43 Fed. 92; *Gabrielson v. Waydell* (C. C.) 67 Fed. 342; *The Fred E. Sander* (D. C.) 95 Fed. 829; *Whitney v. Olsen*, 108 Fed. 292, 47 C. C. A. 331; *The Eva B. Hall* (D. C.) 114 Fed. 755; *The Iroquois*, 118 Fed. 1003, 55 C. C. A. 497; *The Troy* (D. C.) 121 Fed. 901. Not only does the opinion in the *Osceola* Case express no disapproval of the doctrine of these decisions, but it incidentally cites the two leading cases of *Brown v. Overton* and *The City of Alexandria*—the former upon the proposition that a seaman receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship. That was a case in which consequential damages were awarded a seaman who was injured on a voyage from Calcutta to Boston, for the failure of the master to take him into the port of St. Helena for medical treatment.

To support the proposition that the law of Great Britain gives no lien upon a vessel for consequential damages in a case such as is here presented, the appellants rely upon the provisions of the merchants' shipping act of 1894. A few only of the sections of that act are pertinent to the present inquiry. Section 156 provides, in substance, that a seaman may not by any agreement forfeit his lien on the ship, or be deprived of any existing remedy for the recovery of his wages. Section 207 provides that the expense of providing necessary surgical and medical advice and attendance, and the expense of maintenance of a member of the ship's crew who is hurt or injured in the service of the ship, "shall be defrayed by the owner of the ship without any deduction on that account from his wages," and that if by the neglect of the master or owner there is failure to equip the ship with proper medicines, medical stores, or accommodations, the owner or master shall be liable to pay all expenses (not exceeding three months' wages) properly and necessarily incurred by reason of the illness, and that such expenses may be recovered as if they were wages duly earned, "but this provision shall not affect any further liability of the master or the owner for the neglect or any other remedies possessed by the seaman or apprentice." Section 208:

"If any of the expenses attendant on the illness, hurt or injury of a seaman or apprentice, which are to be paid under this act by the master or owner, are paid by any British consular officer or other person on behalf of the crown, or if any other expenses in respect of the illness, hurt or injury of any seaman or apprentice whose wages are not accounted for under this act to that officer are so paid, those expenses shall be repaid to the officer or other person by the master of the ship. If the expenses are not so repaid, the amount thereof shall, with costs, be a charge upon the ship, and be recoverable from the master or from the owner of the ship for the time being, as a debt to the crown, either by ordinary process of law or in the same court and manner as wages due to seamen."

It is contended that under these statutory provisions the lien upon the ship in favor of the seaman is limited to his claim for wages, and that, while the owner of the ship is required to furnish medicine and attendance, if he fails so to do the owner, not the ship, must repay to the seaman the amount of expenses actually incurred therein. It is to be noted, however, that the act gives to any British consular officer who pays such expenses a lien on the ship therefor, for it declares

that such expenses shall be a charge upon the ship, to be recovered in the same court and manner as wages due seamen. It is undisputed that, under the English law, wages due a seaman may be recovered by a proceeding in rem in the admiralty court. It is not shown what was the law of Great Britain prior to the enactment of the merchants' shipping act of 1894. If prior to that time the English admiralty courts recognized a lien upon a ship, and the right to proceed against her in rem for the recovery of damages, in a case such as we have here under consideration, we do not find that the act, in terms or by necessary implication, has impaired that right. It has declared, it is true, that the expenses of medical advice and attendance to a hurt or sick sailor shall be defrayed by the owner of the ship, and it provides for the recovery of damages, to a limited extent, for the failure so to do, but this is not necessarily inconsistent with the existence of a right to pursue the vessel in rem; and there follows the proviso that "this provision shall not affect any further liability of the master or owner for the neglect or any other remedies possessed by the seaman or apprentice."

But it is said that, irrespective of the special provisions of the merchants' shipping act of 1894, by the law of England, as interpreted by its courts, the master and the crew of a ship are fellow servants at all times, under all circumstances, and as to all relations; and the appellants cite the decision of Lord Chancellor Herschell in *Hedley v. Pinkney, etc., S. S. Co., Ltd.*, 7 Asp. Mar. Law Cases, 483, in which it was said:

"It was argued that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, and that the law which exempts a master from liability to his servant for the negligence of another servant engaged in a common employment with him did not apply in such a case."

And the Lord Chancellor proceeded to add that he did not think it possible to give effect to that contention.

That was a case in which the personal representative of a seaman who had been lost at sea sued the owners for damages; alleging that the master, while navigating the ship at sea, was negligent, in failing to have placed in position, on the approach of stormy weather, a detachable portion of the ship's rail. The court, in denying the right of the administratrix to recover, made use of the language above quoted. What was there said in answer to the argument that a duty rested upon the master to keep the ship at all times in a seaworthy condition, and that as to that duty he was not a fellow servant with the members of the crew. There was no question in that case, however, but that the vessel was in a seaworthy condition when the voyage began, and that the owners had in that respect fully met their obligation. In holding, as the opinion does, as to the question there presented and the argument so advanced, that the master and the crew were fellow servants, the decision is not inharmonious with the more recent decisions of the American courts; and there is nothing in the language of the court that may not be reconciled with the view that as to all the duties of the ship or its owners to the crew, where sickness or injury has in-

tervened, the master is, in England as in the United States, the representative of the former.

It is urged, also, that in the opinion in the *Osceola* Case the Supreme Court has placed upon the decision in *Hedley v. Pinkney, etc.*, S. S. Co. a construction which accords with the appellants' contention in the present case. It is true that the court in that case said:

"In the English courts the owner is now held to be liable for injuries received by the unseaworthiness of the vessel, though not by the negligence of the master, who is treated as a fellow servant of the seamen. Responsibility for injuries received through the unseaworthiness of the ship is imposed upon the owner by the merchants' shipping act of 1876, 39 & 40 Vict. c. 80, § 5, wherein, in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage. *Hedley v. Pinkney, etc.*, S. S. Co., 1894 App. Ca. 222—an action at common law. Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the Admiralty Court jurisdiction act of 1861, although it seems an action in admiralty will lie against the master in personam for an assault committed upon a passenger or seaman. * * * In England the master and crew are also treated as fellow servants, and hence it would follow that no action would lie by a member of the crew against either the owners or the ship for injuries received through the negligence of the master. *Hedley v. Pinkney, etc.*, S. S. Co."

It is clear, however, that this language of the opinion and the discussion of the British law in reference to the question under consideration were directed to the question which had been certified to the court—the question of the liability of the ship for an injury to a seaman occasioned by the negligent act of the master in navigating the ship. It is not perceived that it had any reference to the entirely different question which is involved in the case at bar—the question of the duty of the ship to a seaman after he has been injured in the performance of his duty.

But it is contended that the doctrine of the liability of the ship to furnish medical attendance to the seaman, as recognized in American decisions, received its origin in article 6 of the laws of Oleron, and that those laws have never been recognized as constituting a part of the admiralty jurisprudence of England, but, on the contrary, have there been repudiated in the case of *The Whitton*, 8 Asp. Mar. Law Cases, N. S. 110 (affirmed by the House of Lords in 8 Asp. Mar. Law Cases, N. S. 272), where it was said that the original or common-law jurisdiction of the High Court of Admiralty of England must be ascertained "from the continuous practice and judgments of the great judges who have presided in the Admiralty Court, and from judgments of the High Courts at Westminster. * * * Neither the laws of the Rhodians, nor of Oleron, nor of Wisbuy, nor of the Hanse towns, are of themselves any part of the admiralty law of England." The court, to sustain that utterance, proceeded to point out the absurdities of some of the obsolete portions of the laws of Oleron. Conceding, however, that the laws of Oleron, as a whole, are not at the present time any part of the admiralty law of England, by virtue of proclamation, legislative act, or the adjudications of the admiralty courts, it

does not follow that certain of their provisions are not the basis of the English admiralty law as it is at present administered. Said Judge Ware, in 1837, in deciding the case of *The William Harris*, 1 Ware, 373, Fed. Cas. No. 17,695, "There is not a single principle of maritime law more generally recognized by the usages of all commercial nations than this: That the expenses of the sickness of any of the crew shall be borne by the vessel." In *Harden v. Gordon*, 2 Mason, 541, Fed. Cas. No. 6,047, decided in 1823, Story, Circuit Justice, speaking of the universal rule that such expenses were made a charge upon the ship, referred its origin to the laws of Oleron, "which have been held in peculiar respect by England, and have been in some measure incorporated into her maritime jurisprudence"; and in *Reed v. Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641, the same distinguished jurist quoted from the "excellent treatise" of Lord Tenterden on Shipping, who, he said, lays it down generally "that, by the ancient marine ordinances, if a mariner falls sick during the voyage, or is hurt in the performance of his duty, he is to be cured at the expense of the ship"; and the learned justice proceeded to add, "And he is fully borne out in this statement by the language of the ordinances cited by him on this occasion." See Laws of Oleron, art. 6, etc. In all the American adjudications it is clear that section 6 of the articles of Oleron has been regarded as the origin of the law on that subject as it is administered in our courts. From what source has that provision of those ancient laws been incorporated into our admiralty law, if not through its adoption and recognition in the country from which we have inherited that law? There seems no room to doubt that King Richard I adopted for his kingdom the laws of the Island of Oleron, which was then a part of his dominion. See Benedict's Admiralty, § 51, and authorities there cited.

Question is made of the jurisdiction of the trial court, on the ground that the ship is a foreign vessel, and both the appellants and the appellee are aliens. Conceding that the court had discretion to exercise or decline jurisdiction, we discover nothing in the record to indicate that there was abuse of discretion in that regard. The British vice consuls at Port Townsend and Tacoma disclaimed authority to adjudicate the matters involved in the suit. *Bolden v. Jensen* (D. C.) 70 Fed. 505; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Panama R. R. Co. v. Napier Shipping Co.*, 166 U. S. 285, 17 Sup. Ct. 572, 41 L. Ed. 1004. Said the court in *The Belgenland*, "As the assumption of jurisdiction in such cases depends so largely on the discretion of the court of first instance, it is necessary to inquire how far an appellate court should undertake to review its action." The court then proceeded to affirm the rule that the appellant must show that the trial court has exercised its discretion on wrong principles, or that it has acted so absolutely differently from the view entertained by the appellate court that the latter is justified in saying that discretion has been wrongly exercised. To have relegated the appellee to an English court would almost certainly have been to deny him any remedy. He, a German, was left on American soil, crippled and without means. He has prosecuted his suit in forma pauperis. If he had been able to go to England, he could not know when the

Troop would be there, or that she would ever be there, or that, if she were, any of his witnesses would be on board or within his reach.

Concerning the facts of the case, we are not convinced, upon a careful consideration of the evidence, that error was committed by the District Court. The court found negligence in the failure of the master to send the appellee back to the hospital at Fusan, gross negligence in the treatment of the appellee at sea, and further negligence in the failure to send the appellee immediately to a hospital on arriving at Port Angeles, from all of which negligent acts the appellee has been permanently crippled, and disabled from following his calling as a mariner.

The decree of the District Court will be affirmed.

ROSS, Circuit Judge (dissenting). I agree with the court below that the gross neglect of the master of the ship disclosed by the record presents a shocking instance of "man's inhumanity to man"; but, being of the opinion that by the law of England the ship is not liable in rem for the damages claimed, and that under the decision of the Supreme Court in the case of *The Osceola*, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, I feel obliged to dissent from the judgment against the ship, allowing the libellant \$4,000 damages for the neglect of the master in his treatment of him.

(128 Fed. 277.)

EAU CLAIRE NAT. BANK v. BENSON.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1904.)

No. 845.

1. RES JUDICATA—CONCLUSIVENESS OF JUDGMENT OF STATE COURT—CONSTRUING LAWS OF ANOTHER STATE.

Where a state court determined, either as a question of law or fact, that a suit therein to enforce the statutory liability of a stockholder of a corporation of another state could not be maintained under the laws of the latter state, which, as construed by its Supreme Court, gave a right of action only to the creditors as a body against the stockholders as a body, and thereupon dismissed the action on the merits, its judgment was conclusive on the parties, and a second action by the same complainant against the same defendant on the identical cause of action cannot be maintained in a federal court.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

The case was heard in the Circuit Court on demurrer to the bill and amended bill. The demurrer being sustained, the bill and amended bill were dismissed. From the decree of dismissal the appeal is prosecuted.

The bill is to enforce the liability of appellee, as a stockholder in the Minnesota Elevator Company, a corporation organized August 16, 1883, under the laws of Minnesota, and doing business in that state. The Elevator Company

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1508.

Conclusiveness of judgments as between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.

ceased to do business September 2, 1884, when a voluntary assignment was made under the laws of Minnesota, and all its property distributed, through one of the state district courts, among all the creditors who filed their claims and releases under the Minnesota insolvency act.

The appellant is a national bank, located at Eau Claire, in the state of Wisconsin, and on October 8, 1883, loaned to the Minnesota Elevator Company two thousand dollars, and on October 22, 1883, the further sum of two thousand dollars, both loans being evidenced by promissory notes, bearing interest at the rate of ten per cent. No part of these notes, either interest or principal, has been paid.

The appellee, at the dates of these loans, was the owner of thirteen thousand dollars par value of the stock of the corporation, and continued to be such owner until December 15, 1883, when the stock was sold and transferred.

Liability is claimed under the following provision of the constitution of Minnesota then and still in force: "Each stockholder in any corporation (except those organized for the purposes of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

The bill shows that on December 20, 1884, judgment was recovered upon these notes, by the appellant against the Minnesota Elevator Company, in the Circuit Court of the United States for the District of Minnesota, and, an execution having been issued thereon, was returned nulla bona, December 22, 1884, a date preceding the commencement of this suit.

The bill further shows that there were some ten or eleven other stockholders, holding in the aggregate nearly two thousand shares of stock, of the par value of nearly one hundred thousand dollars; that all of these stockholders are non-residents of Wisconsin; that none, except appellee, have been found in Wisconsin; that two of them were dead; that all of them except five are insolvent; and that of these five (holders of about thirty-five thousand dollars, par value) there is no showing that they were either solvent or insolvent.

The bill further shows that November 18th, 1897, suit was brought in the Circuit Court of Eau Claire County, Wisconsin, by appellant against appellee, to recover upon the indebtedness upon which this suit is founded, and based upon the same facts upon which this suit proceeds. In this suit in the state court appellee answered, setting forth, among other defenses, the constitutional and statutory provisions of Minnesota and the decisions of the Supreme Court of Minnesota interpreting the same, wherein it is held that the liability of one is enforceable only in the District Courts of Minnesota in a general suit of settlement on behalf of all the creditors and against all the stockholders; that there had been no such general suit of settlement in any District Court of Minnesota as determined the right of the creditors and the liability of the stockholders; wherefore no liability against appellee in favor of appellant could be enforced in the courts of Wisconsin. In addition to this, the statute of limitations of both Wisconsin and Minnesota were pleaded in bar.

Issues of fact and law having been taken upon these contentions, the Circuit Court of Eau Claire County found, that under the constitution and laws of Minnesota the liability is of all the stockholders to all the creditors; that each stockholder is liable only for such proportion of the total debts of the corporation as the stock held by him bears to the total stock held by the solvent stockholders; that a suit to enforce such liability must be in equity in one of the District Courts of the state of Minnesota, and can be enforced nowhere else than in such District Court; that the action was not brought within six years from the time the alleged causes of action or any thereof mentioned, accrued in favor of plaintiff against the defendant; and, as a general conclusion, that the plaintiff could not maintain such action at that time in that court. Thereupon a judgment was entered "That the plaintiffs complaint herein be, and the same hereby is, dismissed," and for costs. On appeal to the Supreme Court of the state of Wisconsin, this judgment was affirmed. The question here is whether the demurrer to the bill was rightly sustained by the United States Circuit Court.

H. B. Walmsley, for appellant.

C. T. Bundy, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court.

The Supreme Court of Minnesota has interpreted the constitutional provision quoted, and the Minnesota legislation in pursuance thereof, to the effect that a suit to enforce stockholders' liability must be brought in one of the District Courts of Minnesota and must be in the nature of a suit in equity, prosecuted by, or on behalf of, all the creditors against the corporation and all the stockholders. *Allen v. Walsh*, 25 Minn. 543; *Johnson v. Fischer*, 30 Minn. 173, 14 N. W. 799; *In re Martin's Estate*, 56 Minn. 420, 57 N. W. 1065. These cases hold that under the Minnesota constitutional provision the stockholders are liable as a body to the creditors as a body, the object being to create a fund to the extent of such liability for the benefit of all the creditors. A suit by a single creditor, therefore, against the stockholders would not lie, for the fund might be exhausted in favor of a single creditor. A suit by all the creditors, or by a single creditor on behalf of all the creditors, against a single stockholder would not lie, for the stockholder thus sued might be compelled to contribute more than his just proportion of the amount remaining due. The suit must be in the nature of a general settlement wherein the right of each creditor may be settled, the liability of each stockholder determined, the fund resulting being thereby ratably contributed by stockholders, and ratably distributed among creditors.

Whatever might have been our ruling, had the questions herein presented come to us at first instance, it is plain to us that the Wisconsin courts have in the suit set forth in the bill ruled, as a matter either of law or of fact, that in view of the Minnesota constitution and statutes, as interpreted by the Minnesota courts, appellant could not enforce liability against the appellee in any court outside the appropriate District Courts of Minnesota, or in any suit to which the corporation, the stockholders and the creditors were not parties. The judgment entered in the Wisconsin state court, and affirmed by the Supreme Court, is not shown to have been one of non-suit. Its effect, under the findings, is one of dismissal on the merits. The judgment thus rendered, whether of law or of fact, was by a validly constituted court, having jurisdiction of the cause. The parties in that suit were the same as the parties in this suit. The causes of action in the two suits were identical, and the points passed upon were the same. Questions thus determined, whether they be questions of law or of fact, become, as between the same parties respecting the same subject matter, the law and the fact of the controversy; and cannot afterwards be litigated by new proceedings, either before the same or any other tribunal. This is applicable to federal courts, as well as to state courts; for although the federal courts and the state courts are organized under distinct governmental authority, their judgments are not to be treated as foreign judgments, but as the judgments of concurrent courts, giving to each the full faith and credit that is to be accorded to courts of record within the state. *Tioga Railroad Company v. Blossburg Railroad Company*, 20 Wall. 137, 22 L. Ed. 331. The demurrer was rightly sustained and the decree below must be affirmed.

(129 Fed. 92.)

THOMAS, Collector of Customs, v. WANAMAKER.

(Circuit Court of Appeals, Third Circuit. February 17, 1904.)

No. 33.

1. CUSTOMS DUTIES—CLASSIFICATION—DRESS GOODS—EMBROIDERED WOOLLEN ARTICLES—WEARING APPAREL.

Held, that so-called wool "dress robes" or "dress patterns," consisting of women's dress goods of wool, embroidered with silk, imported in single patterns in separate lengths and pieces, each pattern comprising the material for the body and trimming of a dress, are "dress goods," and are dutiable under the provision in paragraph 369, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], for "women's * * * dress goods * * * composed wholly or in part of wool," which is limited by the expression "not specially provided for in this act," and not under paragraph 371 of said act, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667], which provides, without such limitation, for "articles embroidered, * * * made of wool," nor under paragraph 370 of said act, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], relating to "articles of wearing apparel of every description, * * * manufactured * * * in part, * * * composed wholly or in part of wool."

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 123 Fed. 193.

This appeal was brought by C. Wesley Thomas, Collector of Customs at the port of Philadelphia, from an affirmance (123 Fed. 193), by the Circuit Court of two decisions of the Board of General Appraisers covering importations by John Wanamaker, and reversing the assessment of duty.

Following is one of the opinions filed by the board, which fully covers the issues in the case:

De Vries, General Appraiser. This merchandise consists of wool robes or dress patterns. It was assessed for duty at the rate of 50 cents per pound and 60 per cent. ad valorem, under the provisions of paragraph 371, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667], as "embroideries" or "articles embroidered by hand or machinery, * * * made of wool, or of which wool is a component material." The protest claims as follows: "We claim that said goods should have been assessed at 44 cents per pound and 55 per cent. ad valorem under paragraph 368, 369, or 366, 30 Stat. pp. 184, 185 (U. S. Comp. St. 1901, pp. 1666, 1667); or at 11 cents per square yard and 55 per cent. ad valorem under paragraph 369; or that the appraiser should have segregated the values of the plain dress goods and the embroidered pieces, and classified the plain pieces of the dress goods at 44 cents per pound and 55 per cent., or at 11 cents per square yard and 55 per cent. ad valorem, under the provisions of above paragraphs; and should have classified the embroidered pieces at the rate of 50 cents per pound and 60 per cent. ad valorem under paragraph 371, or at 60 per cent. ad valorem under paragraphs 390 and 339, 30 Stat. pp. 187, 181 (U. S. Comp. St. 1901, pp. 1670, 1662), or 44 cents per pound and 55 per cent. ad valorem under paragraphs 368, 369, or 366." The protest was submitted without the introduction of any evidence in support thereof, and no appearance was made in behalf of the importers. The return of the collector recites, among other things: "I beg to state that the merchandise in question consists of women's dress goods in single patterns, each pattern comprising material for the body of the dress and material for trimming the same, in separate lengths or pieces. All of said material, both for the foundation or trimming, is embroidered in silk; and the claim that only a portion of the material is embroidered, and should

be so assessed, is without foundation." In default of contradictory evidence the presumption of correctness attending the return of the collector prevails. We assume for the purpose of decision, therefore, that that return is true. The important fact which it introduces into this record as true is that the whole of the merchandise covered by this protest was embroidered, and that with silk. In the case of *In re Crowley*, 55 Fed. 283, 5 C. C. A. 109, merchandise exactly similar to this was the subject of decision. The paragraph interpreted by that decision was 398 of the tariff act of 1890 (Act Oct. 1, 1890, c. 1244, § 1, Schedule K, 26 Stat. 597). The gist of the decision was that woolen dress patterns embroidered with silk or silk and metal are not dutiable as woolen "embroideries," but were dutiable as woolen "dress goods," under paragraph 395 of said act (26 Stat. 597). Paragraph 371 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]), is the one corresponding to paragraph 398 of the tariff act of 1890. The former was enacted since the decision cited was rendered, and differs in important particulars from said paragraph 398. Said paragraph 398, so far as pertinent, reads: "398. On webblings * * * and embroideries * * * made of wool * * * or of which wool is the component material, the duty shall be * * *." Said paragraph 371 reads as follows: "371. Webblings, * * * embroideries and articles embroidered by hand or machinery, * * * made of wool or of which wool is a component material, * * * fifty cents per pound and sixty per centum ad valorem." It will be noted that Congress, in the act of 1897, has added the words, "and articles embroidered by hand or machine." While it may be true that under the text of paragraph 398, the subject of said decision, there may be no escape from the conclusion that only woolen embroideries, or embroideries made in part of wool, are meant, and while it may be equally true that that meaning attaches to the word "embroideries" as used in paragraph 371, the addition of the words, "and articles embroidered by hand or machinery," therein, presents the question whether or not this language is intended to embrace a larger class of merchandise, to wit, woolen articles embroidered by whatsoever material the embroidery may be composed of, as well as woolen embroideries. Whatever our conclusion might be on that point, we think this case is concluded by the fact that the protestant invokes the application of paragraph 369 of the act of July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], as covering the merchandise in question. The language of that paragraph, in so far as pertinent, is: "369. On women's and children's dress goods * * * and goods of similar description or character * * * composed wholly or in part of wool, and not specially provided for in this act, the duty shall be," etc., "according to weight, value," etc., thereby asserting the claim that the merchandise is properly described as "women's and children's dress goods" and dutiable as such under said paragraph. In *G. A. 4890* (T. D. 22,893) a precisely similar question arose. The issue there was whether or not certain articles of wearing apparel were dutiable under said paragraph 371 as "articles embroidered by hand or machinery," or paragraph 370 of the tariff act of 1897, as "articles of wearing apparel of every description." This board held that the said provisions of said paragraph 370 were more specific than the said provisions of paragraph 371. In conformity with the board's decision in that case, we hold that the provisions of paragraph 369, relating to "women's and children's dress goods," which are descriptive of the merchandise the subject of this protest, are more specific than the provisions of paragraph 371 assessing duty upon "articles embroidered by hand or machinery." The conjoint provisions of the proviso to paragraph 369 and paragraph 390 of said act are a part of protestant's claim. These provisions, however, when read together, prescribe merely a minimum rate of duty upon such merchandise, which is much less in this case than that prescribed by paragraph 369, found applicable. The protest, therefore, claiming the merchandise properly dutiable under paragraph 369, according to the value and the weight thereof, is sustained. In all other respects the protest is overruled, and the decision of the collector affirmed. Reliquidation will follow.

In support of the collector's appeal from the circuit court it was argued (1) that the merchandise is not known commercially as "dress

goods," but as "dress robes," and is therefore not included within the enumeration of the former in said paragraph 369; (2) that it is dutiable under said paragraph 370 as "wearing apparel * * * made up * * * in part"; and (3) that, conceding the merchandise to be dress goods, within the meaning of paragraph 369, it is specially provided for in said paragraph 371 as "articles embroidered," and is thereby removed from the former paragraph, which contains the qualifying expression "not specially provided for," and which in this respect differs from paragraph 371, which contains no such limitation.

James B. Holland and Wm. M. Stewart, for appellant.
Thos. D. Gates, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Nothing need be added to the opinion of the Board of Appraisers. We think it adequately supports the decision made by the board, and the decree of the Circuit Court sustaining that decision is therefore affirmed.

(129 Fed. 94.)

RUTLEDGE v. NEW ORLEANS & N. E. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,317.

1. CARRIERS—INJURIES TO PASSENGERS—TIME TO ALIGHT.

Where a train stopped for a passenger to alight, and when he was in the act of doing so, and without allowing a reasonable time for that purpose, it was suddenly started with a jerk, whereby he was thrown from the car and injured, he was entitled to recover therefor.

2. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for injuries to a passenger while attempting to alight, there being conflict in the evidence on the issue as to his alleged contributory negligence in stepping off the train while it was moving, it presents a question for the jury.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

This action was brought in the state court by William Rutledge, a citizen of Mississippi, against the New Orleans & Northeastern Railroad Company, a Louisiana corporation, and was, on petition of the defendant company, removed to the court below. Plaintiff claimed \$25,000 damages, alleging that he was a passenger on one of the defendant's trains, having paid his fare from Hattiesburg, Miss., to Ellisville, Miss., and that the train was scheduled to stop at Ellisville for passengers to get off, and that it did stop, or come practically to a stop, and that plaintiff was alighting from the train, but that, while he was in the act of alighting, the train, by the negligence and carelessness of the defendant, through its servants, was suddenly jerked and moved forward, whereby the plaintiff was thrown down and under the train, and so injured as to deprive him of an arm and a leg, and cause him much suffering. Defendant pleaded "Not guilty," and, for further plea, alleged that the injuries complained of were brought about by the plaintiff's own negligence. There is no conflict in the evidence that the plaintiff was injured to the extent

¶ 1. See Carriers, vol. 9, Cent. Dig. § 1228.

of losing his arm. When the car first stopped at the station, the plaintiff failed to get off. There is conflict in the evidence as to whether his failure to alight was caused by the press of other passengers getting into the train, and the crowd that was getting off, or whether he unnecessarily delayed alighting. The train left the station without his alighting, and the pivotal question in the case is whether he got off the train while it was moving so as to make his act dangerous to him, or whether the cars were stopped for the purpose of letting him off, and started again with a sudden jerk at the instant that he attempted to alight. On that subject he testified as follows: "Q. And by the time you had passed through coach and got to platform, the train had started? A. Yes; the train had started, and I couldn't get off. I wouldn't get off before the train stopped. Q. You wouldn't get off till the train stopped again? A. No, sir. Then the flagman or some one told me, 'Old man, get off,' and I told him I wouldn't get off till the train stopped; and I thought it had stopped, and went to step off, and did step, but they gave a sudden jerk, and I fell. Q. Jerked what? The train? A. Yes, sir; just as I went to step off, they moved or jerked the train, and I fell down. * * * Q. And when it came to a stop again, you stepped off, and the train gave a jerk, and you fell? A. The train came to a stop, and as it came to a stop I stepped off, and, as I was stepping off, the train gave a sudden jerk, which threw me down." The plaintiff was corroborated by J. E. Sharbrough, who also got off the train at Ellisville. He testified that, "when we had gotten out and taken a few steps, the train started—pulled out—and then the train came to a little stop." Several other witnesses testified that the train did not stop a second time, and that the plaintiff got off while the train was moving. The trial court instructed the jury to return a verdict for the defendant, and it is assigned that the court erred in directing the verdict.

A. J. McLaurin, for plaintiff in error.

Harry H. Hall, John W. Fewell, and Thomas G. Fewell, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

If the plaintiff jumped or stepped off the train while it was moving at such a rate as to make his act obviously dangerous, he was unquestionably guilty of contributory negligence, and would not be entitled to recover. 2 Wood on Railroads (Minor's Ed. 1894) § 305; Watkins v. Birmingham, etc., Company, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297. But if it be true that the train was stopped to let him get off, and when he was in the act of getting off, and without being allowed a reasonable time for that purpose, it was suddenly started again with a jerk, whereby he was injured, he would be entitled to recover. Bartholomew v. New York Central Railroad Company, 102 N. Y. 716, 7 N. E. 623; Jeffersonville Railroad Company v. Hendricks Adm'r, 26 Ind. 228-233. We are of the opinion that the evidence in the record shows that the question of contributory negligence should have been submitted to the jury. Nelson v. New Orleans, etc., Railroad, 100 Fed. 731, 40 C. C. A. 673, and cases there cited; Mexican Central Railroad v. Townsend, 114 Fed. 737, 52 C. C. A. 369.

The judgment is reversed, and the cause remanded for a new trial.

PARDEE, Circuit Judge, dissents.

(129 Fed. 96.)

**CHRISTENSEN ENGINEERING CO. v. WESTINGHOUSE AIR
BRAKE CO.**

(Circuit Court of Appeals, Second Circuit. February 12, 1904.)

No. 64.

**1. CONTEMPT—PROCEEDINGS FOR VIOLATION OF INTERLOCUTORY INJUNCTION—
REVIEW.**

Under the rule laid down by the Supreme Court in the case of *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, an order in an equity suit adjudging the defendant guilty of contempt for violating an interlocutory injunction restraining infringement of a patent cannot be reviewed by the Circuit Court of Appeals, except upon an appeal from the final decree in the cause.

In Error to the Circuit Court of the United States for the Southern District of New York.

See 123 Fed. 632; 126 Fed. 764.

Wm. A. Jenner, for plaintiff in error.

Frederic H. Betts, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error to review an order of the court below adjudging the defendant in an equity suit brought to restrain the infringement of a patent guilty of contempt for violating an interlocutory injunction restraining such infringement.

This court has decided that such an order cannot be re-examined here, unless upon an appeal from a final decree in the cause. If it can be reviewed in the court in which it was made at the final hearing of the cause, it is not a "final decision," within the meaning of section 6 of the act conferring jurisdiction upon this court. We reviewed such an order in *Gould v. Sessions*, 67 Fed. 163, 14 C. C. A. 366, but that case was decided before the decision of the Supreme Court in *Re Debs*, 158 U. S. 564, 573, 15 Sup. Ct. 900, 39 L. Ed. 1092. After the decision in *Re Debs*, the question arose again in *Nassau Electric R. Co. v. Sprague Electric Co.*, 95 Fed. 415, 37 C. C. A. 146, and we dismissed the writ of error with this observation: "Upon the authority of the *Debs* Case, we are constrained to hold that the order cannot be reviewed, except upon an appeal from the final decree in the cause." In *Cary Manufacturing Company v. Acme Company*, 108 Fed. 873, 48 C. C. A. 118, we reviewed on writ of error an order imposing a fine upon the defendant in an equity suit for the violation of an injunction. The injunction, however, was not interlocutory, but was granted by the final decree. This circumstance was not referred to in the opinion, but explains the apparent conflict between the decision and that in *Nassau Electric R. Co. v. Sprague Electric Co.* The order was final, in the sense that it was a judgment in a criminal case, which was independent of and separate from the original suit, and which could not be reviewed on an appeal from the final decree in that suit. *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391; *New Orleans v. Steamship*

Co., 20 Wall. 387, 392, 22 L. Ed. 354. In *Butler v. Fayerweather*, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120, the question whether an order like the present could be reviewed by this court was not involved. The order reviewed there was made in a cause to which the plaintiff in error was not a party, and committed him for his refusal to answer certain questions propounded to him as a witness; and the decision was placed upon the ground that in such a case the aggrieved party "has no opportunity to be heard when the cause is before the court at final hearing, and as to him the proceeding is finally determined when the order is made."

Whether the present order can be re-examined at the final hearing of the cause, at which time all previous interlocutory orders are open for review, is a question which we are not now called upon to decide. Unless it can, there can, of course, be no review by an appeal from the final decree. In *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853—an equity cause to restrain the infringement of a patent—two orders fining the defendant for contempt for the violation of a preliminary injunction were reviewed and reversed upon an appeal from the final decree. In that case, however, the court regarded the orders as only nominally proceedings in contempt.

The hardship of compelling a party to wait until he can appeal from a final decree to obtain a review, especially in cases in which the defendant has been committed and is suffering imprisonment, is manifest, and we should be glad to be able to see our way clear to depart from our former decision. That decision, however, was constrained by the decision in the *Debs Case*, and the *Debs Case* is an authority which cannot be disregarded. This was an equity cause in which some of the defendants were adjudged guilty of contempt for the violation of a preliminary injunction and sentenced to imprisonment. Having been committed to jail, they applied to the Supreme Court for a writ of error, and also for one of habeas corpus. The court denied the writ of error, and it is stated by the reporter that it was denied "upon the ground that the order of the Circuit Court was not a final judgment or decree." When the application was made, the act establishing Circuit Courts of Appeals (Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) authorized the Supreme Court to review by writ of error convictions in cases of infamous crime; and if the denial had been placed upon the ground that the case was not one of a conviction for an infamous crime, and therefore was reviewable only upon a certificate of division of opinion, there would have been no conflict between the decision and that in *New Orleans v. Steamship Co.*, 2 Wall. 387, 22 L. Ed. 354, in which the court held that contempt of court is a criminal offense, and the imposition of a fine is a judgment in a criminal case. We are not at liberty to assume that the Supreme Court overlooked its former decision in *New Orleans v. Steamship Co.*, or that its reporter incorrectly reported the later decision.

The writ of error is dismissed.

(129 Fed. 98.)

THE DUMPER NO. 8.

(Circuit Court of Appeals, Second Circuit. January 25, 1904.)

No. 54.

1. SALVAGE—NATURE OF SERVICE BY MASTER AND CREW—EFFECT OF TOWAGE CONTRACT BY OWNER.

A contract by an owner of tugs to tow dumpers from their dumps in the city to sea and return imposed no obligation on the master and crew of one of the tugs to go to the rescue of a dumper which had been abandoned by another tug, and had drifted out to sea; and where they did so, and at considerable peril to themselves rescued her, and brought her safely to port, the service was voluntary, and they are entitled to compensation as salvors.

2. SAME—AMOUNT OF AWARD.

A salvage award of \$1,175 to the master and crew of a tug, consisting of nine men, for the rescue of a dumper worth \$8,000 to \$10,000, which had become derelict, and drifted 25 miles out to sea in a gale, and would probably have been a total loss, *held* not excessive, where the service was entirely successful, and was performed at considerable personal risk.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal by claimants from a decree of the District Court for the Eastern District of New York awarding libelants salvage to the amount of \$1,175.

Le Roy S. Gove, for appellant.

Peter S. Carter, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. At about half past 10 o'clock on the morning of February 8, 1902, the master of the steam tug De Witt C. Ivins, having been notified by its owner, Michael Moran, that two of claimant's dumpers, which had been in tow of one of Moran's steam tugs, were adrift, and in danger, started to rescue them. On arriving at Sandy Hook he learned that they had last been seen about 11 o'clock. After proceeding in an east southeast course for some 25 miles he found the two dumpers abandoned by their tug, with no one on board, and drifting out to sea. The wind was blowing northwest, 50 or 60 miles an hour, there was a heavy sea on, and it was freezing weather. Dumper No. 8, the one saved by libelants, was covered with ice four inches thick all over her bow and sides. The mate of the Ivins volunteered to go aboard said dumper, provided the tug could be put along side of her. The proposed undertaking involved risk to the tug of collision with the dumper, and risk of drowning to any one attempting to board the dumper. The risk was assumed, the undertaking was successfully accomplished, involving damage to the tug to the amount of \$200, and the dumper was made fast and towed back to New York, reaching there the following morning at 7 o'clock. Another tug, the Ellis, also belonging to Moran, went down to look for the dumpers, and

¶ 2. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

found the other one, but her master testified that he was unable to get any one aboard of her, on account of the danger involved in rough sea and other conditions as stated above. The Ivins was worth \$30,000; the dumper some \$7,000 to \$10,000. The owner of the Ivins having released the dumper and her owners from any claim of said tug for salvage, the court awarded salvage to the libelants as follows: To the captain of the vessel, \$300; the mate, \$200; the two deck hands, \$100 each; the two engineers, \$100 each; the two firemen, \$100 each; the steward, \$75—a total of \$1,175.

There is no question as to the existence of two of the elements necessary to constitute a valid salvage claim, namely, a marine peril and success. The claimants rest their appeal on the contention that these services were not voluntary, but were included under the contract between the claimants and Moran. This contract provided that Moran should tow the dumpers from the different dumps around New York and Brooklyn to sea, and return them to the different dumps, or to the foot of Court street if they needed repairs, for a stated price. Counsel for claimants insists that these libelants were not volunteers because they were only occupied in the usual service for which they were employed and paid. There is nothing in the contract to support this contention. It was a mere contract of towage. The evidence fails to show any obligation resting on Moran, or on the crews of his tugs, to undertake to save a dumper when derelict. When the Ivins reached the dumper, under conditions already shown, the sole question was one of a voluntary service on the part of the master and crew. They were under no obligation to risk their lives and the safety of the tug in an attempt to rescue the dumper. The mate volunteered, the master acquiesced, and all voluntarily participated in the danger incident to the marine peril. The rule invoked by counsel for claimants that a master and crew thus employed are not volunteers is generally confined to those aboard the ship in peril. 3 Parsons, Contracts, 317, and cases noted. There it is generally held that the services must be considered as rendered under contract, because it would be unwise to tempt the sailors to let the ship incur perils, and afterwards allow them compensation in the nature of a reward for success in averting such perils. The Clara and Clarita, 23 Wall. 1-16, 23 L. Ed. 146. Mr. Justice Clifford says:

"A salvor is defined to be a person who, without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing contract that connected him with the duty of employing himself for the preservation of the vessel." Page 16.

The test as to whether services are voluntarily rendered is whether such services are rendered by those who are under no legal obligation to render them. Hughes, Admiralty, 129.

In *The Connemara*, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751, a tug was employed to tow a ship, and both came to anchor at night. A fire broke out in the night, and the officers and crew of the tug assisted in extinguishing the flames, and were awarded salvage therefor. The Supreme Court held that the contract of the towboat and of her crew was to tow the ship, and that for such other services as rescued the ship from an unforeseen and extraordinary peril the owner,

officers, and crew of the tug boat were entitled to salvage. We conclude that the services rendered were the proper subject of a salvage award.

It is further contended that the award is excessive. Whether the amount was determined upon a valuation of the dumper at \$8,000 or \$10,000 is immaterial. The evidence shows that the other dumper was never found; that this one was derelict, and drifting out to sea, and would probably have been a total loss except for the efforts of these salvors. We think the award was reasonable.

The decree of the District Court is affirmed, with interest and costs.

(129 Fed. 100.)

SAWYER v. ATCHISON, T. & S. F. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 29.

1. RAILROADS — PROPERTY — TRANSFER — BONDHOLDERS — EQUITY — REMEDY AT LAW.

Where the property of a railroad company was acquired by another railroad company under foreclosure proceedings which were void as against a holder of bonds guarantied by the mortgagor company, such bondholder was not entitled to sue the purchasing company in equity to apply the assets so transferred to the payment of his bonds, until he had exhausted his legal remedies against the mortgagor.

2. SAME — RECOVERY OF BONDS — ACTIONS — JOINDER.

Where a holder of bonds guarantied by a railroad company deposited them with a trust company for specific uses, and thereafter such company wrongfully refused to deliver the bonds on demand, the owner could not join an action to recover them with a suit against another corporation, which had acquired the assets of the guarantor company under void foreclosure proceedings, to apply such assets in payment of the bonds; such company being in no way responsible for the trust company's withholding of the bonds.

3. SAME — DAMAGES — PROOF.

Where railroad bonds were deposited for specific uses with a trust company, which afterwards wrongfully refused to return the same on demand, the fact that, because the bonds were not dealt in on the exchanges, and were obligations of a corporation which had become practically defunct, it was rendered difficult to establish their value, did not justify plaintiff in resorting to a court of equity to recover the same.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 119 Fed. 252.

John Ford, for appellant.

Alfred Opdyke, for appellee Atchison, T. & S. F. R. Co.

A. H. Van Brunt, for appellee Central Trust Co.

Before WALLACE and COXE, Circuit Judges.

WALLACE, Circuit Judge. The material facts set forth in the very voluminous bill of complaint in this cause, and the prayers for relief, are concisely and adequately summarized in the opinion of the court below, and any recapitulation is unnecessary. The propositions

of law which control the case are so plain as to require no amplification or citation of authority.

An analysis of the bill shows that the complainant is a creditor of the Atchison, Topeka & Santa Fé Railroad Company, by reason of the guaranty by that company of the payment of 20 negotiable bonds made by the Colorado Midland Railroad Company, the guaranty being indorsed upon the bonds; that these bonds are in the possession of the Central Trust Company, having been placed there by the complainant for certain specific uses, and the trust company wrongfully retains them and refuses to return them to complainant; and that the Colorado Midland Railroad Company and the Atchison, Topeka & Santa Fé Railroad Company have denuded themselves of all their property, and the same has been acquired by the Atchison, Topeka & Santa Fé Railway Company by proceedings which, as against the complainant, were a nullity.

After recovering a judgment against the railroad company, and upon the return of his execution unsatisfied, the complainant will be in a position to pursue the property in the hands of the Atchison, Topeka & Santa Fé Railway Company, which was formerly the property of the railroad company; but it has no equitable cause of action against the railway company until these remedies have been exhausted. His cause of action is purely a legal one as against the defendants the trust company and the railroad company, and he has as yet no equitable cause of action against the defendant the railway company. His remedy against the trust company is by an action at law in trover or replevin, and his remedy against the railroad company is by an action at law upon the guaranty. No action can be maintained against the trust company and the railroad company jointly, because the latter has taken no part in the conversion of the complainant's bonds, and the former is not a party to the guaranty. The fact that it may be difficult to prove the value of his bonds or of the guaranty in an action against the trust company does not supply a reason for resorting to a court of equity to recover of the trust company. It is always difficult to establish the value of the obligations of an extensive corporation which has become practically defunct, because they are not dealt in on the exchanges; but it can be established, and not infrequently is, in actions where the question is in controversy.

The court below properly held that the demurrers of the trust company and the railway company upon the grounds of want of equity and multifariousness were well taken, and the decree is

Affirmed, with costs.

(129 Fed. 102.)

STAR BRASS WORKS v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1904.)

No. 1,317.

1. APPEAL—INTERLOCUTORY DECREE GRANTING INJUNCTION—ADVANCEMENT OF CAUSE.

A decree on the merits, finding infringement of a patent, awarding a permanent injunction, and directing a reference to ascertain damages and profits, is an interlocutory decree granting an injunction, appealable under section 7 of the act creating the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828), as amended by Act June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550], and the appeal is entitled to precedence, as provided in said section, and to be advanced on the calendar for hearing, subject, however, to the rules of the court as to the filing of briefs, unless for reasons of exigency shown a special order is made for an earlier hearing.

On Motion to Advance Cause.

See 109 Fed. 950.

Fred L. Chappell, for appellant.

Betts, Betts, Sheffield & Betts and Joseph Wilby, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from a decree upon the merits, finding infringement, awarding a permanent injunction, and directing a reference to ascertain damages and profits. It comes on now to be heard upon the motion of the appellant to advance the cause under section 7 of the Court of Appeals act (Act March 3, 1891, c. 517, 26 Stat. 828) as amended June 6, 1900 (31 Stat. 660, c. 803 [U. S. Comp. St. 1901, p. 550]). That section, as amended, reads as follows:

"Sec. 7. That where, upon a hearing in equity in a District Court or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the Circuit Court of Appeals: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: Provided further, That the court below may in its discretion require as a condition of the appeal an additional bond."

Although the injunction order appealed from is not a preliminary injunction intended to operate only until a hearing upon the merits, it was nevertheless an "interlocutory decree," inasmuch as the decree was not final in an appealable sense. This appeal was taken within 30 days. The cause is therefore one which is entitled to take "precedence" upon the calendar of this court. But this does not mean that

¶1. Review of interlocutory decrees granting or continuing injunctions in patent cases by Circuit Court of Appeals, see notes to Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co., 3 C. C. A. 572; Southern Pac. Co. v. Earl, 27 C. C. A. 189; New York, N. H. & H. R. Co. v. Sayles, 32 C. C. A. 484.

the rules of the court with reference to the filing of briefs are to be ignored. Precedence is given by advancing the cause upon the calendar over other cases not advanced, so that it may be called when ripe for hearing under the rules, or earlier if counsel shall choose to expedite the preparation of the cause, or upon a special order made by the court for special reasons of exigency made to appear.

The motion to give this cause precedence is allowed, and it will be set down for hearing as soon as the briefs are due under the rules, or so soon as the record shall be printed and the briefs filed, if counsel shall by diligence file same before due.

(129 Fed. 103.)

THE ANSON M. BANGS.

(Circuit Court of Appeals, Second Circuit. March 2, 1904.)

No. 125.

1. COLLISION—STEAM TUG AND SCHOONER.

A tug held solely in fault for a collision with a schooner on a crossing course for persisting in her course, on the theory that the schooner would not run out her tack which she was privileged to do, with the duty resting on the tug to keep out of her way.

2. SAME—DAMAGES—EVIDENCE.

Hearsay testimony introduced on a hearing before a commissioner to determine the damages caused by collision must be treated as of no probative force, although not objected to until the filing of exceptions to the commissioner's report, and will not warrant a finding not supported by other evidence.

Appeal from the District Court of the United States for the Eastern District of New York.

Le Roy S. Gove, for appellant.

Chas. C. Burlingham, for appellee.

Before WALLACE and COXE, Circuit Judges.

WALLACE, Circuit Judge. The concise opinion of Judge Thomas in the court below covers the facts and the law of the case as regards the responsibility of the tug for the collision so adequately that little further need be said. We have carefully examined the record and concur in his conclusions. It will not be useful to discuss the evidence. The primary fault which led to the collision was the persistency of the tug in keeping her course along the westward side of the channel upon the theory that the schooner would not run out her starboard tack, when a slight change of her course to port at the time she made a slight change of her course to starboard would have carried her astern of the schooner. The schooner was privileged to run out her tack, and it was her duty in doing so not to change her course unless required by the exigencies contemplated by the twenty-fourth rule of navigation, and it was obligatory upon the tug as a steam vessel to keep out of the schooner's

† 2. See Admiralty, vol. 1, Cent. Dig. § 618.

way. Although the schooner held her course for a short time after it was apparent that she would strike the tug's hawser or scow unless the tug made a decisive change of course, that conduct is not to be deemed a fault. It was her duty to hold her course until it was plain that the tug could not so maneuver as to avert the peril. The absence of a lookout on the schooner, or one who was attending to his duty, did not contribute in the least to the collision, as the collision took place in the daylight, and the master of the schooner, who was in charge of her navigation, was himself keeping a lookout, was otherwise unoccupied, and observed the tug vigilantly for the half or quarter of an hour which intervened before the risk of collision and actual collision.

We must assume, from the assignments of error and argument at the bar, that the appellants seriously care to contest the award of damages. Eliminating the hearsay testimony which was introduced by the libelants before the commissioner, the amount of the loss was not sufficiently established, and, although no objection was taken to this testimony until exceptions were filed to the report of the commissioner, it must be treated as of no probative force.

The decree will be reversed, without costs in this court, and with instructions to the District Court to ascertain the amount of damages, and decree for the libelants, with costs of that court.

(129 Fed. 104.)

LOPEZ v. COLLIER.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,331.

1. APPEAL—FINDINGS OF TRIAL COURT—CONFLICTING EVIDENCE—REVIEW.

A finding of fact by the trial court based on conflicting evidence will not be reversed on appeal where it is not clearly erroneous.

Appeal from the District Court of the United States for the Southern District of Florida.

J. M. Phipps and George G. Brooks, for appellant.

G. Bowne Patterson and Joseph Paxton Blair, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit for a balance due for work done upon a naphtha launch belonging to Lopez, defendant in the court below, and appellant here, and for materials furnished in the course of the work. The total alleged cost of the material, work, etc., was \$1,693. Payments on account and credits amounted to \$803. The balance claimed was \$889.61. The defendant claims that it was agreed and understood that the work was not to cost more than \$1,000; that it was not good work; that the payments made, added to the amounts paid out, subsequent to the return of the boat by Collier, to have work done which should have been done by Collier, leave nothing due to libelant. There was a decree in favor of the libelant for \$604.67, from which this appeal is taken.

The case presents simple questions of fact. The evidence is conflicting. Several witnesses testified for libellant, and proved up his case. They were contradicted by several witnesses produced by defendant to prove up his case. The testimony was all taken in presence of the trial judge, who thus had an opportunity to see the witnesses and observe their demeanor while testifying; and, on the evidence, we are not able to say that he reached an erroneous conclusion.

The decree appealed from is affirmed.

(129 Fed. 105.)

BULLOCK ELECTRIC & MFG. CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1904.)

No. 1,242.

1. CONTEMPT—VIOLATION OF INJUNCTION—NATURE OF PROCEEDINGS TO PUNISH.

The willful violation of an injunction by a party to the cause is a contempt of court, which constitutes a criminal misdemeanor, and the proceeding to punish therefor is in its nature a criminal proceeding, entirely independent and distinct from the suit in which the injunction decree was entered, and a judgment of conviction therein is reviewable by writ of error, and not by appeal.

2. SAME—REVIEW—JURISDICTION OF CIRCUIT COURT OF APPEALS.

A judgment of a Circuit Court imposing a fine on a party for contempt for the violation of an injunction is a judgment in a criminal case, and if unconditional and absolute, so that nothing remains but to execute it, is final and reviewable by the Circuit Court of Appeals on a writ of error.

3. CONTRIBUTORY INFRINGEMENT.

The making and selling of a single element of a patented combination, with the purpose and expectation that such element should be sent to a foreign country and be there used in combination with other elements, or in the practice of a method covered by the patent, is not contributory infringement, inasmuch as there was no intent that the element should be put to an infringing use; the protection of the patent not extending beyond the limits of the United States.

4. PATENTS—INJUNCTION AGAINST INFRINGEMENT—ACTS CONSTITUTING INFRINGEMENT.

A preliminary injunction was granted restraining the defendant in an infringement suit from "the making, using, or selling of any apparatus embodying the inventions recited or specified" in the claims of three patents. The first two covered combinations of mechanical elements, one element in each being a motor which operated by the method of the third patent, covering such method alone. Pending the suit defendant made and shipped to a customer in Canada the motor of the patent, with the expectation and intent that it would be there used in the devices of the combination claims of the first two patents and in the practice of the method of the third patent. *Held*, that defendant was not chargeable with infringement nor guilty of a violation of the injunction, since (1) the making or selling of a single element of a combination is not an infringement of a patent covering the combination, but not the elements separately; (2) the making or selling of a machine adapted to practice the method of the third patent was not an infringement of such patent; and (3) the use of the patented combinations, or the practice of the patented method, in Canada, was not an infringement of the United States patents, and consequently defendant was not chargeable with contributory infringement.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

The Westinghouse Electric & Manufacturing Company filed an original bill against the Bullock Electric & Manufacturing Company to restrain the infringement of certain letters patent granted to Nikola Tesla, being patents Nos. 381,968, 382,279, and 382,280. Upon the pleadings and upon certain affidavits the court below, upon motion and notice, granted an injunction pendente lite, restraining the defendant, its officers, agents, and servants, "from infringing upon claims 1 and 3 of patent 381,968, claims 1, 2, and 3 of patent 382,279, and the claim of patent 382,280, or any of them." The injunction as actually issued and served commanded the defendants to "desist from making, using, or selling any apparatus embodying the inventions recited or specified in claims 1 and 3 of patent 381,968, claims 1, 2, and 3 of patent 382,279, and the claim of patent 382,280, or any of them, or in any manner infringing upon the rights of the complainant thereunder." Subsequent to the service of this injunction the defendant made and shipped a certain motor to Canada to be there used as an element in the combinations covered by the claims involved of patents Nos. 381,968 and 382,279, and in the method claim of patent No. 382,280. Upon a motion supported by affidavits, and upon the admission of counsel representing the defendant that the motor complained of had been made and shipped to Canada to be there used in the devices of the patent, and that it was installed and so used, the court adjudged that the claims of the patents involved had been thereby infringed and the preliminary injunction violated, and that the defendants were in contempt, and ordered to pay a fine of \$500. A bill of exceptions was allowed, and this writ of error sued out to reverse this judgment.

Stew, Heidman & Mehlhope, for plaintiff in error.

Frederic H. Betts, Thomas B. Kerr, and C. Hammond Avery, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The willful violation of an injunction by a party to the cause is a contempt of court constituting a specific criminal offense. *Ex parte Kearney*, 7 Wheat. 38, 42, 5 L. Ed. 391; *Crosby Case*, 3 Wilson, 188; *New Orleans v. Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354; *Hayes v. Fischer*, 102 U. S. 121, 26 L. Ed. 95; 4 Ency. Pl. & Pr. 766 et seq.

It is immaterial to consider the distinction sometimes noticed between criminal and civil contempts, inasmuch as both kinds involve the vindication of the authority of the court, whether the remedy incidentally inure to the benefit of a party or not. *Cyclo. Law & Proc.* 6 et seq.

The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be partially remediable or not, and the same rules prevail which govern in the trial of indictments, the defendant being entitled to the benefit of any reasonable doubt. *Accumulator Co. v. Consolidated Electric Co. (C. C.)* 53 Fed. 793; *In re Acker (C. C.)* 66 Fed. 291; *Harwell v. State*, 10 Lea, 544; 4 Ency. Pl. & Pr. 768 et seq.; *U. S. v. Jose (C. C.)* 63 Fed. 951.

Although the contempt consist in the violation of an injunction granted by a court of equity, the proceeding for its punishment "is a new and distinct proceeding, and is quite independent of the equities

of the case on which the decree is founded," and "an appeal is not an appropriate remedy for obtaining a review." *City of Frankfort v. Deposit Bank of Frankfort* (decided at February session of this court) 127 Fed. 812; *New Orleans v. Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354; *In re Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782.

Is it reviewable by a writ of error? A contempt proceeding is classified as a misdemeanor and not as a felony. *In re Acker* (C. C.) 66 Fed. 291. Misdemeanors are reviewable by this court upon writ of error by virtue of the broad appellate powers conferred by the act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], establishing Circuit Courts of Appeal, and defining and regulating the appellate powers of United States courts. If, therefore, the imposition of the fine complained of "was a judgment in a criminal case" as it is defined to be in *New Orleans v. Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354, it was a judgment in a misdemeanor case; for contempts are universally classified as misdemeanors, and not felonies. *In re Acker* (C. C.) 66 Fed. 291. If a judgment in a misdemeanor case, it is reviewable upon writ of error by this court. This conclusion was reached by the Circuit Court of Appeals for the Second Circuit in *Gould v. Sessions*, 67 Fed. 163, 14 C. C. A. 366. But in *Nassau Electric R. Co. v. Sprague Electric Co.*, 95 Fed. 415, 37 C. C. A. 146, and *Christensen Engineering Co. v. Westinghouse Air-Brake Company* (decided Feb. 15, 1904) 129 Fed. 96, 63 C. C. A. 598, writs of error were dismissed upon the authority of *In re Debs*, 158 U. S. 564, 573, 15 Sup. Ct. 900, 39 L. Ed. 1092.

In the statement of the *Debs* Case, at page 573, 158 U. S., and page 903, 15 Sup. Ct., 39 L. Ed. 1092, it is stated that the defendants in that case had "applied to this court for a writ of error, and also one of habeas corpus. The former was denied, on the ground that the order of the Circuit Court was not a final judgment or decree." The only report of the decision on the writ of error is found in 159 U. S. 251, 15 Sup. Ct. 1039, where the statement is, "Petition denied."

The Supreme Court had no jurisdiction in respect of writs of error in misdemeanor cases, and the writ of error upon this ground was necessarily denied. The reporter's statement that it was denied because the order "was not a final judgment or decree" is doubtless an error. Certainly we do not feel justified in departing from the well-settled doctrine, so often enunciated in former cases, in respect of the distinctness of a judgment imposing a fine for a contempt from the case in which the disobeyed order was made, upon so slender an authority. If the judgment, as in this case, was in fact unconditional and absolute, so that nothing remained but to execute it, it was in every sense a final judgment.

The claim that a defendant in such circumstances must await the final result of the cause in which the injunction was granted before he can have the judgment inflicting fine or imprisonment reviewed upon the theory that the judgment is not final is absolutely unsupportable. If it be an independent and distinct proceeding from the residue of the case, it will be no more final after that case has reached a final decree than when the fine was imposed. To say that he may pay his fine

or endure his imprisonment and review the legality of the matter at some indefinite time in the future is to deny, in effect, the right of review at all. The motion to dismiss the writ is denied.

Was the defendant, on the conceded facts of the case, guilty of contempt as matter of law? Upon this writ of error no question as to whether the injunction was rightly or wrongly, providently or improvidently, issued can arise. The court confessedly had jurisdiction of the parties and of the subject-matter, and the bill of exceptions recites that the temporary injunction was issued upon bill, answer, exhibit, affidavits, "and upon the agreement of the defendant."

Neither is the result to turn upon any question of conflicting fact, for it is not the province of a reviewing tribunal to weigh the facts upon a writ of error.

The claims which defendant was enjoined from infringing were the first and third of patent No. 381,968, granted to Nikola Tesla May 1, 1888, and read as follows:

(1) "The combination, with a motor containing separate or independent circuits on the armature or field magnet, or both, of an alternating current generator containing induced circuits connected independently to corresponding circuits in the motor, whereby a rotation of the generator produces a progressive shifting of the poles of the motor, as herein described."

(3) "The combination with a motor having an annular or ring-shaped field magnet and a cylindrical or equivalent armature, and independent coils on the field magnet or armature, or both, of an alternating current generator having correspondingly independent coils and circuits including the generator coils and corresponding motor coils, in such manner that the rotation of the generator causes a progressive shifting of the poles of the motor in the manner set forth."

The first, second, and third claims of patent No. 382,279, granted May 1, 1888, to Nikola Tesla, and are in these words:

(1) "The combination, with a motor containing independent inducing or energizing circuits and closed induced circuits, of an alternating current generator having induced or generating circuits, corresponding to and connected with the energizing circuits of the motor, as set forth."

(2) "An electro-magnet motor having its field magnets wound with independent coils and its armature with independent closed coils, in combination with a source of alternating currents connected to the field coils, in combination with a source of alternating currents connected to the field coils and capable of progressively shifting the poles of the field magnet, as set forth."

(3) "A motor constructed with an annular field magnet wound with independent coils and a cylindrical or disk armature wound with closed coils, in combination with a source of alternating currents connected with the field magnet coils, and acting to progressively shift or rotate the poles of the field as herein set forth."

And the single claim of patent No. 382,280, granted May 1, 1888, to the same patentee, which reads as follows:

"The method herein described of electrically transmitting power, which consists in producing a continuously progressive shifting of the polarities of either or both elements (the armature or field magnet or magnets) of a motor by developing alternating currents in independent circuits, including the magnetizing coils of either or both elements, as herein set forth."

Confessedly the five claims of the first two patents are combination claims. The single claim of the third patent is not a mechanical claim, but a claim for a method of electrically transmitting power. A

motor constructed according to the specifications of the patent is one of the elements in each of the combination claims, and the evidence tended to show that such a motor must operate by the method of the third patent.

The plaintiff in error was adjudged to be in contempt because, pending the injunction, it made and shipped to a customer in Canada the motor of the patent, with the expectation and intent that it would be there used in the devices of the combination claims and in the practice of the method of transmitting electrical power protected by the claim of the method patent. Was this, as matter of law, a contempt of the authority of the court?

The injunction forbid "the making, using, or selling of any apparatus embodying the inventions recited or specified" in the claims of the three patents heretofore set out. The monopoly of a patent extends to the making or selling, as well as the using, of the patented device within the United States. *Adams v. Burks*, 17 Wall. 453, 456, 21 L. Ed. 700; *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 291, 25 C. C. A. 267, 35 L. R. A. 728; *Dorsey Rake Co. v. Bradley M. Co.*, 12 Blatchf. 202, Fed. Cas. No. 4,015.

While it is true that the monopoly of the plaintiff's patents did not extend beyond the limits of the United States, yet it would be no defense to say that the patented article had been made in the United States only for the purpose of being sold and used in a country to which the protection of the laws of the United States did not extend. The patentee is entitled to monopolize the making of his device in the United States as well as a monopoly of there selling or using it. *Dorsey Harvester Co. v. Bradley Co.*, 12 Blatchf. 202, Fed. Cas. No. 4,015; *Ketchum Harvester Co. v. Johnson Co.* (C. C.) 8 Fed. 586; *Adrian Platt Co. v. McCormack Co.* (C. C.) 55 Fed. 288. *Gould v. Sessions*, 67 Fed. 163, 14 C. C. A. 366, is not in conflict, for in that case the only question concerned the alleged violation of an injunction against the future making, selling, or using of the patented article.

The articles sold in supposed violation of the temporary injunction had been made before the injunction was granted, and pending the injunction were shipped to Canada and there sold. There had been, therefore, no violation of the injunction, because there had been no making or selling or using of the patented device after the allowance of the injunction, within the limits of the United States. But it is elementary that neither the making, selling, nor using of one element of a combination is infringement. *Prouty v. Ruggles*, 16 Pet. 336, 10 L. Ed. 985; *The Corn Planter Patent*, 23 Wall. 181, 224, 23 L. Ed. 161; *Rowell v. Lindsay*, 113 U. S. 97, 101, 5 Sup. Ct. 507, 28 L. Ed. 906. In the corn planter patent Mr. Justice Bradley said:

"Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device, or part of the machine, this is an implied declaration as conclusive, so far as that patent is concerned, as if it were expressed that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this; but that will speak for itself. So far as the patent in question is concerned, the remaining parts are old or common and public."

In *Rowell v. Lindsay*, Mr. Justice Wood said:

"The patent of the plaintiffs is for a combination only. None of the separate elements of which the patent is composed are claimed as the invention of the patentee; therefore none of them, standing alone, are included in the monopoly of the patent."

It must follow, therefore, that, unless there be something to take this case out of the general rule, the making or selling or using of a single element of a combination patent does not per se constitute an infringement of a combination claim. Neither can it be said, in a legal sense, that any one element of a combination patent is an "apparatus embodying the invention," within the meaning of the injunction which the defendant is supposed to have disobeyed.

It may be true, as claimed, that the Tesla motor constitutes the real essence of the three Tesla inventions covered by the claims of the patents in suit. Tesla, however, neglected to claim the motor as a separable device. He deliberately elected to claim it only as he claimed the other elements of his combination claims, and thereby abandoned any claim to its novelty or to a monopoly of its use, except as a part of one or other of his combination claims. The method claim is not for any apparatus at all. The mere fact that the Bullock Company made and sold such a motor does not per se constitute an infringement of such a method claim. We are not now dealing with the question of contributory infringement for that will be considered later. What we decide is that the mere fact that one has made and sold an apparatus adapted to be used in following the methods of Tesla's method claim does not constitute infringement. He is not entitled to extend that claim so as to include apparatus adapted to its practice. A licensee thereunder may practice the method with any motor adapted to such method, and we see no reason, if the motor itself is not patented, why such a licensee might not supply himself with a motor adapted to so operate from any manufacturer.

But the Circuit Court found that after the granting of the injunction pendente lite the defendant company made and shipped to one John McDougal, of the Caledonia Iron Works, Montreal, Canada, a motor made according to the description of the Tesla patents in suit, and that this was done with the intent and expectation that the motor would be there installed and used in the devices of the patents in suit. Judge Thompson held upon these facts that the defendants "had not only infringed the plaintiff's patents by contributing to the device set up in Canada, but directly infringed the claim of patent No. 382,280."

But did the defendants infringe either of the combination claims, or disobey the injunction of the court, by making and sending to Canada a single element of those claims with the intention and for the purpose of being there used in one or other of the combinations of the patent. The monopoly of the patents did not extend to Canada. The patented devices were open to be there made or sold or used because the monopoly of the patent is limited to the United States and its territories. Unless, therefore, the making and selling of a single element of a patented device, within the limits of the United States, with the intention that it shall be sent without the United States, and there used in association with the other elements of the combination, constitutes

infringement, the defendants did not disobey the order of the court. But unless the making and sale of the single element was with the intention and purpose of aiding and abetting another to infringe there would be no contributory infringement under the well-settled law upon that subject.

No better definition of contributory infringement can be found than that given by Judge Taft when speaking for this court in *Thomson-Houston Electric Co. v. Ohio Brass Works*, 80 Fed. 712, 721, 26 C. C. A. 107, where that learned judge said:

"It is well settled that when one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination he is guilty of contributory infringement, and is equally liable to the patentee with him who in fact organizes the complete combination. * * * An infringement of a patent is a tort analogous to trespass or trespass on the case. From the earliest times, all who take part in a trespass, whether by actual participation therein, or by aiding and abetting it, have been held to be jointly and severally liable for the injury inflicted. There must be some concert of action between him who does the injury and him who is charged with aiding and abetting, before the latter can be held liable. When that is present, however, the joint liability of both the principal and accomplice has been invariably enforced."

The intent and purpose that the element made and sold shall be used in a way that shall infringe the combination in which it is an element constitutes the necessary concert of action between him who furnished the single part and he who actually does the injury by the assembling and using of all the parts in such a way as to be an infringement. This principle runs through all the cases upon contributory infringement. *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 297, 25 C. C. A. 267, 35 L. R. A. 728; *Saxe v. Hammond*, Fed. Cas. No. 12,411; *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100; *Thomson-Houston Co. v. Kelsey Electric Co.*, 75 Fed. 1005, 22 C. C. A. 1; *German-American Filter Co. v. Loew Filter Co. (C. C.)* 103 Fed. 303, affirmed 107 Fed. 949, 47 C. C. A. 94.

In *Snyder v. Bunnell* (C. C.) 29 Fed. 47, Judge Coxe gave his emphatic approval to the principle laid down by Judge Shipley in *Saxe v. Hammond*, cited above, where it was said that "the mere manufacture of a separate element of a patented combination, unless such manufacture be proved to have been conducted for the purpose and with the intent of aiding infringement, is not in and of itself infringement." That the single element was made and sold was with the intent and purpose of aiding another in infringing must appear, or the necessary concert of action will be missing. This may be shown presumptively, as it is when the article is incapable of any other use than an infringing one. If, on the other hand, it be adapted to other uses "the intention to assist in infringement must be otherwise shown affirmatively." *Thomson-Houston Co. v. Ohio Brass Works*, 80 Fed. 712, 723, 26 C. C. A. 107. These principles we think determine this case.

The finding that the intent and purpose in making and selling this motor was that it should be used in the patented devices in Canada is a finding against any infringing purpose. It would not be an infringement to put the motor to the use intended, because that use was beyond the protection of the patent. The defense is as complete as

if the intent had been to furnish the motor to one having a license to make, sell, and use. In neither case would there be an intent to assist in an infringement, and without such intent the plaintiff in error was not infringing the patents or disobeying the order of the court.

What we have said applies as well to the method patent as to the combination claims. There must be shown an intent to assist another in an infringing use of the patented method. There being no intent to provide means by which another might unlawfully use the Tesla method, there is no contributory infringement.

The judgment, for these reasons, must be reversed, with directions to discharge the rule to show cause.

Following will be found the opinion of the court below (THOMPSON, District Judge):

This suit was brought to enjoin defendant of letters patent Nos. 381,968, 382,279, and 382,280 and for an accounting, etc. On the 2d day of August, 1902, an injunction was issued pendente lite restraining the defendant, its officers, etc., "from making, using, or selling any apparatus embodying the inventions recited or specified in claims 1 and 3 of patent No. 381,968, claims 1, 2 and 3 of patent No. 382,279, and claims of patent No. 382,280, or any of them, or in any manner infringing upon the rights of the complainant thereunder." Afterwards, to fill an order previously given by John McDougal, of Montreal, Canada, the defendant made, at its works, in the United States, near Cincinnati, in the state of Ohio, and on the 27th day of April, 1903, shipped to John McDougal, at Montreal, Canada, a 500 horse power induction motor, 13 feet in diameter, with 44 poles and operated from a "60 cycle, 2,200 volt, 3 phase circuit," the factory cost of which was \$11,265.20.

This defendant admits that his motor was made and shipped to McDougal for the express purpose of being used in the device of the patents in suit, and that it was so used, but insists that the plaintiff's patents were not infringed thereby, because the making of the device took place in Canada. This claim is based on the assumption that there can be no making of a combination device, within the meaning of the patent laws, until all its parts are assembled and joined together, in accordance with the teachings of the letters patent, and as the assembling of the parts and the completion of the device in question took place in Canada, where the patent laws of the United States are inoperative, the patents of the plaintiff are not infringed. If this be true, the defendant, in evasion of the patent laws of the United States, may make all the parts of the device in the United States, ship them to Canada, and there assemble them and sell the device to its customers in disregard of the plaintiff's rights—may thus appropriate the plaintiff's invention to its own use without making compensation therefor.

But is this true? In issuing the patents in suit the government of the United States granted to the plaintiff "the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof," and any making, use, or sale thereof within the territory of the United States, against the will of the plaintiff, is an infringement of its monopoly, and a violation of the patent laws of the United States. Neither the defendant nor McDougal were licensees of the plaintiff, but, on the contrary, joined in appropriating the plaintiff's invention to their own use without the plaintiff's consent and against its will. What the defendant did was done in the United States for the express purpose of enabling McDougal to complete the appropriation in Canada, not as the licensee of the plaintiff, but against the plaintiff's will, and was an infringement of the plaintiff's patents, and the wrong is not lessened by the fact that McDougal is not amenable to the laws which the defendant has violated. In making the motor the defendant not only infringed the plaintiff's patents by contributing to the device set up in Canada, but directly infringed the claim of letters patent No. 382,280, which provides that "the method herein described of electrically transmitting power,

which consists in producing a continuously progressive shifting of the polarities of either or both elements (the armature or field magnet or magnets) of a motor by developing alternating currents in independent circuits, including the magnetizing coils of either or both elements, as herein set forth."

The cases of *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, 37 L. Ed. 766, and *Gould v. Sessions*, 67 Fed. 163, 14 C. C. A. 366, cited by the defendant's counsel, do not support defendant's claim. In *Hobbie v. Jennison* the assignee of the patent for Michigan sold the patented articles in Michigan, knowing that the purchaser intended to use them in Connecticut. As assignee of the patent for Michigan, he had the exclusive right to make, use, and vend the patented articles in Michigan without reference to where they might afterwards be used. The assignment contained no provision forbidding him to sell the patented articles to persons who might or would use them in other states.

In *Gould v. Sessions*, Judge Shipman says: "The record, which consists of the affidavits, without a finding of facts, shows that, after the injunction order had been served upon the plaintiffs in error, they shipped to Canada a quantity of the infringing articles, which had been made before the injunction, without previously offering them for sale, or notifying any one of their wish to sell. The goods were followed by one of the defendants, who sold them to a trunk dealer in Montreal, who had been a customer of Sessions', and had been in the habit of buying the noninfringing articles. Upon this naked state of facts, we are of opinion that there was no violation of the injunction order. The sale was made in Canada, of trunk catches then in Canada, to a Canadian trunk manufacturer, to be there placed upon trunks in the ordinary course of business, and, so far as is known, no one of the articles was thereafter used in the United States." In that case the infringing articles were made before the injunction was issued, and were afterwards shipped to Canada, and sold and used there. They were not sold or used in the United States, and were not made in the United States after the injunction order was issued. Judge Shipman further said: "Inasmuch as the articles were made before the injunction, the manufacturer was not in contempt of the court's order, and, as no preliminary arrangements for the sale were made in the United States, the sale did not come within the prohibition. It is probable that the Circuit Court had misgivings in regard to the good faith of the affiants, but, as there is no contradiction of their statements, we regard the question as one of law, upon a state of facts not in substantial controversy."

Here there is an intimation that if there had been a preliminary arrangement made in the United States for the sale of the infringing articles in Canada the sale would have come within the prohibition of the injunction. In the case at bar there is evidence which would perhaps justify the court in finding that the sale of the motor was received by the defendant through its agent in Canada, but the contract was not made until the order was accepted by the defendant.

Upon the evidence presented by the affidavits and the admissions of the defendant, through its counsel, the court finds that the defendant made the motor in violation of the order of injunction, thereby committing a contempt of court, for which it should be punished.

It is urged in mitigation of the penalty to be imposed that the defendant acted under the advice of counsel and believed that it might lawfully make the motor. The defendant, however, made the motor in deliberate disregard of the plaintiff's rights. The defendant knew that it was to be used in the device of the patents in suit, and made it expressly for that purpose. The defendant may have believed that it was acting outside of the scope of the order of injunction, but did not hesitate to violate the rights of the defendant.

The court cannot permit litigants to construe orders of injunction to suit their own convenience and interest. If they be in doubt as to what is required of them, they must come to the court for instruction or for such modifications or amendments of the order as will make their duty plain. Writs of injunction are issued to meet emergencies and to prevent irreparable injury, and these purposes may be defeated if the courts permit them to be trifled with or disobeyed. It must be understood that the court will require prompt and implicit obedience to such orders. A fine of \$500 will be imposed upon the defendant, which must be paid within 10 days.

(129 Fed. 114.)

**NATIONAL CASH REGISTER CO. v. NEW COLUMBUS WATCH CO. et al
SAME v. HALLWOOD CASH REGISTER CO. et al**

(Circuit Court of Appeals, Sixth Circuit. March 22, 1904.)

Nos. 1,220, 1,221.

1. PATENTS—ASSIGNMENT—INSTRUMENTS ENTITLED TO REGISTRATION.

An instrument which does not purport to convey any present interest in an existing patent, or one for which an application is pending, is not an "assignment, grant, or conveyance," within the meaning of Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387], and its registration does not operate as constructive notice to an assignee of a patent subsequently applied for, and granted to the person executing the same.

2. SAME—NOTICE TO ASSIGNEE OF EQUITABLE RIGHTS OF THIRD PERSONS.

Where the attorney for an inventor, having been requested by complainant to ascertain whether his client would sell a pending application for a patent, bought such application himself, without disclosing the fact that he was acting for any one else, and then resold and assigned the same to complainant for more than double the price he paid, complainant was not affected by his knowledge that others had an equitable interest therein.

3. SAME—BONA FIDE PURCHASE WITHOUT NOTICE.

Evidence of a fraudulent purpose, or conduct amounting to moral turpitude, is not necessary to deprive a purchaser of a legal title of the advantage of his position. If he is shown to have been aware of such facts as to put a reasonably prudent man upon inquiry, he is chargeable with all the facts which would have been developed if inquiry had been prosecuted with reasonable diligence.

4. SAME—FACTS TO PUT ASSIGNEE ON INQUIRY.

Complainant purchased and took an assignment of an application for a patent which had been pending in the Patent Office for some four years. Six months before the filing of such application, complainant had been in negotiation with the applicant and two other persons for the purchase of prior patents for inventions made by him relating to the same kind of machines, and issued to the three, and was then informed of an agreement between them by which, so long as it continued in force, the other two persons furnished the capital necessary to perfect and patent all inventions made by the inventor relating to such subject-matter, and were to have an equal interest in the patents therefor. In fact, the application bought by complainant covered an invention made under such agreement, and the two persons who furnished the capital were each the equitable owners of a third interest therein. *Held*, that the facts were such as to put complainant on inquiry, and to charge it with notice of all that might have been learned by such inquiry prosecuted with reasonable diligence, and that it did not acquire a title to the patent subsequently issued which would support a suit for its infringement.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Edward Rector, Frank P. Davis, and J. B. Hayward, for appellant.
Paul A. Staley and Border Bowman, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. These bills were brought to restrain infringement of patent No. 599,625, issued to the complainant, as assignee of Harry M. Neer, for improvements in cash registers.

The defendants separately pleaded that the complainant was not the owner of the entire and complete interest in said patent, and that Thos. Reynolds and Oliver W. Kelly were each the owners of an undivided one-third interest in the inventions covered by said patent. Issue was taken upon the said plea, and the cases heard together upon the pleadings and evidence by District Judge Thompson, who sustained the pleas and directed the bills to be dismissed.

The invention involved was completed in July, 1893, and an application for a patent made by the inventor in September, 1893. In July, 1897, Neer assigned his pending application to W. H. Chamberlain, and the latter assigned to the complainant, which prosecuted the application and obtained a patent in February, 1898. When Neer made this invention, and when his application was filed, he was associated with Thos. Reynolds and O. M. Kelly under a contract by which the parties were to develop and finally manufacture cash registers and adding machines. Neer was a man of marked mechanical ability and inventive genius, but was without money or credit. Kelly and Reynolds obligated themselves to pay all expenses of prosecuting his inventions, including cost of patents, etc., and to allow him \$10 per week for his individual maintenance. Neer agreed, upon these considerations, to assign to Kelly a one-third interest in every invention he should make while this contract lasted, and to Reynolds a like interest. This arrangement seems to have originated as far back as 1890, and prior to 1893 at least three patents had been taken out by Neer for improvements in cash registers; the patents issuing to Neer and to Kelly and Reynolds, assignees, of one-third each. To better secure his interest in all future improvements Reynolds took from Neer, under date of July 22, 1893, a document in these words:

"July 22, 1893.

"Received of Thos. Reynolds \$30.00, in consideration of which I assign to him a one-third interest in all my improvements and inventions in Cash Registers or Adding Machines which I have been working on and yet uncomplete. Those completed, those for which application have been made for Pat. or I contemplate making application for Patent upon. In short, it is understood and agreed that he must be given a $\frac{1}{3}$ interest in all such patents conceived by me.

Harry Neer.

"Witness, W. M. Wise.

"Recorded Aug. 2, 1893."

This was recorded in the Patent Office August 2, 1893. The money thus receipted for was on account of expenses incurred by Neer in the invention here involved.

Neither Reynolds nor Kelly had parted with their equitable interest in this invention when Neer assigned the application in July, 1897, and we agree with the court below in its finding that Kelly and Reynolds were each the equitable owners of an undivided interest in said invention when Neer assigned in 1897, and when the patent issued to his assignees in 1898. The controversy turns wholly upon the question as to whether the complainant company was a bona fide purchaser, without knowledge or notice of this equitable interest of Kelly and Reynolds. This so-called assignment by Neer to Reynolds of July 22, 1893, is undoubtedly valid between the par-

ties, as an assignment of a one-third interest in any future inventions made by Neer. But it was not an assignment of any existing patent or pending application, for Neer had long before assigned a one-third interest in each of his inventions to Reynolds, and the patents had been issued according to the assignment. Neer having by his prior recorded assignments, which did not include improvements, conveyed to Reynolds the one undivided third in all existing patents, and there being no application pending for any patent, there was nothing upon which this document could operate which entitled it to registration as an assignment, grant, or conveyance, under section 4898, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3387]; Robinson on Patents, §§ 411, 769, 785; Wright v. Randel, 8 Fed. 591; Carpenter v. Dexter, 8 Wall. 513, 532, 19 L. Ed. 426; Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523, 40 L. Ed. 688.

That an assignment of a patent, together with any future improvements thereon, is recordable and operative as a notice to subsequent assignees of patents for improvements, may be conceded. Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577; Aspinwall Co. v. Gill et al. (C. C.) 32 Fed. 697. But none of these former assignments included improvements, so that no question of the effect of such an instrument upon later assignees exists. What we decide is that an instrument which was not intended to convey any present interest in any existing patent is not an "assignment, grant, or conveyance," within the meaning of the statute, and that its registration did not, therefore, operate as constructive notice to the complainant company.

Neither do we think the complainants are charged with notice through the knowledge of Chamberlain. Chamberlain was Neer's attorney, and had charge of his application. He was asked to find out whether Neer would sell, and at what price. He bought the application from his client for himself, not disclosing to his client that he was buying for complainant, and then assigned the application to complainant at more than double the price he had paid. In the whole transaction he was acting in his own interest, and in such circumstances there is no presumption that he would disclose his information to his ostensible principal. Thomson-Houston Co. v. Capitol Electric Co. (C. C.) 56 Fed. 849; Pine Mountain Co. v. Bailey, 94 Fed. 258, 36 C. C. A. 229.

That the complainant did not have technical notice of the equitable interest of Kelly and Reynolds in this invention may also be conceded. The real contention is that it had information of facts which put the company upon inquiry, and that they are therefore chargeable with knowledge of all the facts which inquiry would have disclosed. Cordova v. Hood, 17 Wall. 8, 21 L. Ed. 587; Jonathan Mills Co. v. Whitehurst, 72 Fed. 496, 19 C. C. A. 130. At the date of the acquisition of this invention by the National Cash Register Company, it had not culminated in a patent. The right to a patent was pending upon a mere application. This application was filed September 9, 1893, and complainants are undoubtedly chargeable with knowledge of the contents of the file bearing upon that application. Mr. Frank J. Patterson, the general manager of the com-

pany, and its vice president, actively represented his corporation, and, upon an examination of the application, personally directed its purchase. Some steps to this end had been taken by Mr. Rector, the general counsel of the company at Chicago, and the opinion of local counsel at Dayton was subsequently taken as to the claims, and the value of the invention to the complainant; but neither of these gentlemen had, or in the course of their connection with the matter acquired, any knowledge of facts which would in any degree affect their client. Nor is either of them in the slightest degree chargeable with any negligence or bad faith to their client or, any one interested in the matter.

Mr. Patterson was the responsible head of his corporation in respect to all such matters, and was the corporation in all that he said and did about the matter. The result must turn upon his knowledge of facts, and the sufficiency of the facts known to him when he brought this application to cast upon him the duty of inquiry. In February and March of 1893 an effort was made to sell to the complainant patents No. 476,295, of June 7, 1892, 490,304, January 24, 1893, and No. 491,020, of January 31, 1893, issued to Neer and to Kelly and Reynolds, assignees of Neer, for one-third each. Mr. Patterson was first approached and the negotiation opened in behalf of Neer by Mr. A. W. Cochran, a relative of Neer's. Patterson was then distinctly informed that Neer and Kelly and Reynolds were associated together for the purpose of devising an improved cash register, and also adding machines; that Neer was the inventor, and Kelly and Reynolds the capitalists; that Neer was under an engagement to assign to them an undivided one-third interest, each, in all of his inventions while in their employment. Cochran was greatly interested in securing for Neer a more favorable employment than he had with Kelly and Reynolds, and testifies as follows:

"I told them my cousin was a poor inventor, and that Kelly and Reynolds had plenty of money, and he was not liable to get his share of his inventions. Mr. Patterson asked me why I did not bring the machine. I told him the machines were at my house (the two cash registers, one in the metallic case, the other in the wooden case, now before us), but that, if he would come to Chicago, Harry would show him the machines. I also told him that Harry would sell with the consent of Kelly and Reynolds, and would come with them on a salary, and they could get the benefit of all his future inventions, of which he had several now in contemplation. Mr. Patterson said 'Yes,' he could see that Harry would not get as much out of it as he would if he had the money to put in it himself, but, of course, Kelly and Reynolds should have the benefits as long as they were furnishing the capital. Q. Did you say anything at that time as to whether Harry Neer could go with the National Company, and give them the benefit of his future improvements or inventions, without the company buying the machine; and, if so, state what you remember about this? A. I told the Pattersons that Harry could not leave Kelly and Reynolds, without these machines were sold first, and that then he would be free to come with them and give them the benefits of his future improvements. Q. Was anything said to the Pattersons about Neer's contract with Kelly and Reynolds as to inventions that he would make or improvements that he would get up in cash registers? A. Certainly. I already explained to the Pattersons that so long as he was with Kelly and Reynolds they would get the full benefit of his inventions, and I wanted them to buy this machine in order to get the benefits of very valuable improvements

which he already had in mind. I wanted to get them out of the way completely, as we had to get them out of the way before we could do anything with the Pattersons. Q. Who do you mean by 'them,' when you say you wanted to get them out of the way? A. Kelly and Reynolds, because Harry was to them under contract, and could not leave until these machines were sold, and the Kelly and Reynolds business was cleaned up."

As a result of this interview, Mr. Frank J. Patterson went to Chicago to see the model of the machine made under these three patents. Under date of March 8, 1893, he wrote to A. W. Cochran, declining to buy, and saying that Neer's machine infringed the patents of the company, though he did not then point out wherein. Shortly thereafter, and during the same month, the complainant company invited a further conference. For this purpose, Mr. Samuel Cochran, the father of A. W. Cochran, and an uncle of Neer's, together with Neer himself and O. W. Kelly, went to Dayton, and to the shops of the complainant company, and there exhibited and operated the Neer machine. This negotiation extended through parts of three days. Mr. Cochran's principal purpose seems to have been to secure for Neer an engagement as inventor, and he testifies that he told Patterson that he was anxious to get Neer away from Kelly and Reynolds, who were paying him only \$10 per week. He had drawn up a proposed contract between Neer and the complainant, by which the complainant was to have the exclusive right to all of Neer's improvements and future inventions. This contract, he says, was exhibited to and read by Patterson, and also certain contracts between Neer, Kelly, and Reynolds in respect to the formation of a company to make machines. The witness testifies that he told Patterson that Reynolds and Kelly were to have all the benefits of Harry M. Neer's future inventions and improvements in the cash register business, and "that the benefits that I had put in their contract [referring to proposed contract for services of Neer] was the same that was in the contract between Kelly, Reynolds, and Neer." This contract was only proposed in the event the cash register company bought the Neer patents, for Patterson was told that any employment of Neer was dependent upon the sale of the patents owned by the Neer Company. This witness also says that he told Mr. Patterson that Neer had quite a number of improvements in cash registers, "but that I did not want to let Kelly and Reynolds know of those improvements, because I knew they would not raise his salary sufficiently for him to spend his time and remain with them." He also says that Neer showed Mr. Patterson certain "small diagrams, drawn on paper, of improvements, and a way by which he could get around some of the difficult questions that was raised in regard to opening the drawers and raising the tablets."

The sale of the patents and the employment of Neer were coupled together by Mr. Cochran, who demanded for Neer \$600 per month, and a contract for five years. Representing, as he ostensibly did, all of the owners of the patents, he manifested a willingness to sacrifice the Neer Company, in the price of its patents, in order to secure greater advantages for his nephew in the matter of wages, and he confesses to using arguments of this character.

Without going further into the details of the conference and negotiations for the sale of the earlier Neer patents, it is enough to say that, upon the great weight of the evidence, Patterson was during those negotiations fully made aware of the relations between Neer and Kelly and Reynolds, and of their interest in all future improvements Neer might make in cash registers, so long as that association should continue. The negotiations came to nothing, Mr. Patterson claiming that the Neer automatic drawer and indicator infringed two patents owned by his company.

The evidence establishes that, after this failure to sell, Neer at once went to work upon an improved cash register which should obviate the infringements in respect to the drawer and indicating tablets pointed out or claimed by Patterson, and soon produced a model of the machine here involved. This model was sent to Mr. W. H. Chamberlain, a patent lawyer at Chicago, in July, 1893, for the purpose of preparing specifications and claims, and an application for a patent was filed September 15, 1893. All of the expenses incident to this new machine were borne by Kelly and Reynolds. This application hung in the Patent Office, and in 1895 an interference was declared with a pending application owned by the complainant in respect to certain claims common to both, in which the complainant company won out. This interference necessarily called attention to this new invention. As before stated, this application hung along until July, 1897, when, upon the suggestion of Mr. Rector, the complainant's general patent solicitor, who had represented complainant in the Erlach interference mentioned above, Mr. Patterson examined Neer's new application, and bought it for his company, without making any inquiry as to whether Kelly and Reynolds had any interest therein or not. The invention which was involved in the Neer application did not in express terms assume to be an improvement upon his earlier patents. In fact, however, it was an improvement by which Neer had attempted to obviate the infringement claimed by Patterson in respect to the automatic drawer and tablet. The character of the improvement was in itself adapted to recall the information he had received when Neer's earlier machine was offered to him. In addition to this, Mr. Rector, in his letter suggesting the purchase of this application, called attention to the Neer earlier patents, and suggested that, if "we take the Neer application, we had better take the entire lot."

Mr. Patterson does say that he cannot recall his having read any papers in connection with the effort made in 1893 to sell his company the three existing Neer patents. He does, however, admit a recollection of so much which occurred in that negotiation that it is difficult to believe that he had forgotten the relation of Neer to Kelly and Reynolds. He admits that he recalls the fact that the younger Cochran first came to open the way, that the elder Cochran and Neer then came, and that finally he saw the elder Cochran and Kelly and Neer on the third visit to his factory. Reynolds, it is conceded, had no part in the negotiations which then occurred, though Cochran says he explained to Mr. Patterson the reasons for his absence. Asked by his counsel to explain what occurred on the

occasion of the visit of Neer, Kelly, and the elder Cochran at the time the machine was exhibited, he says:

"These gentlemen came to visit the factory upon an invitation from me to exhibit their machine, and, as I understood the situation, Mr. Cochran was the promotor of the Neer Company. Mr. Neer, the inventor of the machine, came to apparently offset any remarks which might be made, calculated to keep Mr. Kelly from investing any money in their company; and, as Mr. Kelly was financially able to carry out any commercial enterprise into which he might engage, I endeavored to convince him that this machine of Neer's could not be made cheap enough or simple enough to ever become a successful cash register. I did not pay any attention to Mr. Neer or to Mr. Cochran, as I knew they would not pay any attention to anything I might say derogatory to their enterprise or machine. From subsequent events, Mr. Kelly declined to go into the enterprise at all. The cash register company was apparently abandoned. Mr. Cochran was very anxious to sell the Neer device and secure for Neer a good position, but, not being successful, he returned to Chicago, and I have heard nothing from him since. The details of all of these conversations, it is not necessary to relate, even if I could remember them. Suffice it to say that these same kind of interviews are constantly held with promoters and inventors of cash registering devices, and for that reason, after the interview was over, I do not often retain more than a casual memory of the circumstances."

While he does say that he has no recollection of ever examining any contracts, or of their contents, or of hearing the name of Reynolds mentioned, he does not in terms deny that he was then informed in respect of the engagement between Neer and his associates, and of the interest of the latter in his subsequent improvements. Neither is it claimed by counsel that he had forgotten what occurred during the 1893 negotiations. Indeed, the very able and frank solicitor for complainant resents the suggestion that he defends upon the ground that Mr. Patterson had forgotten in 1897 the facts which he knew in 1893 in respect of Neer's relations to Kelly and Reynolds. The contention, on the contrary, presented by the briefs, is, first, that complainant had no definite information at any time "that Kelly and Reynolds had or were to have any interest in Neer's future inventions, and that, whatever the character of the information possessed in 1893, the subsequent events known to it were such as, in the absence of knowledge of facts now disclosed by the record, but which were unknown to complainant, to create a reasonable presumption, upon which complainant was justified in acting, that four years later, at the time it purchased, in 1897, Neer was the sole and exclusive owner thereof."

We can see no ground for regarding the information possessed by Mr. Patterson as either vague or indefinite in respect of the interest of Kelly and Reynolds in any further improvements which Neer should patent in respect to cash register machines. The principal object of the negotiations, so far as they were conducted by the two Cochrans, was to secure for Neer with the cash register company a better contract than he then had with Kelly and Reynolds; and, if those witnesses are to be believed, they informed Patterson fully as to the interest of Kelly and Reynolds in his future inventions so long as his existing relations should last. Now, what were the "subsequent events" known to Patterson, when he bought, which are relied upon to create a presumption upon which he was

justified in assuming that the application was the "sole and exclusive property of Neer"? They are substantially as follows: (1) That this application had been on file four years without any assignment to Kelly and Reynolds being filed in the office, whereas such an assignment of his earlier patents had been filed either with the application or shortly thereafter; (2) that the contract between Neer and associates was terminable at will or upon 10 days' notice, and the interest of Kelly and Reynolds was only in such improvements as should be made while those relations lasted; (3) that in fact this partnership was terminated soon after the Dayton negotiations, and that Neer engaged in a different line of inventions; (4) that in April, 1894, a patent issued to Neer and Cochran upon an application filed in April, 1893; (5) that Neer represented that he had made no assignment, and so covenanted in his assignment to Chamberlain.

It is to be borne in mind, in giving due weight to the circumstances mentioned, that Patterson is chargeable with the knowledge that the application he was buying had been filed within about six months of the close of his negotiations for the purchase of the earlier Neer machine. The question he had to ask himself in 1897 was not whether the arrangement between Neer and his associates had continued up to that time, but whether it had not continued up to the time of an application for an improvement made, which had been filed within six months of the close of his former negotiations. Now, he did not know, and could not know, for the fact was otherwise, that Neer had ceased to work with and for Kelly and Reynolds when this application was filed. Neer finished the model for his improved machine in July, 1893, with their means, and placed it in the hands of an attorney to obtain a patent; the application being filed September 15, 1893. Some time about the time of this application, Neer and associates did dissolve, and he took work with the father of O. W. Kelly, and took up a new line of inventions. But the actual fact that the relations of these three men had terminated even in 1897 was not even then known to Patterson. All that he knew about the abandonment of the cash register business consists in the fact that he had heard nothing more about it, and had been told by a Mr. Mast, some two or three years after the negotiations of 1893, "that he [Mast] was of opinion that Mr. Kelly saw no outcome in the cash register, and had decided not to go into the field." This, of course, referred to the scheme of getting up a factory to make the Neer machines, which was a part of the purpose of the Neer Company made known to Patterson in 1893. But counsel frankly do not claim that he knew in 1897 that the Neer Company had broken up, and modestly only insist that Patterson had a right "to assume that it had been abandoned"—a correct assumption if the question was as to its continuance up to 1897, but an incorrect one if it be an assumption that the relation did not exist when the invention in question was made. The assumption that Patterson knew that in 1894 a patent had issued to Neer and Cochran upon an application made within a month after the close of the 1893 negotiations is unauthorized. The fact is true. But it does not appear that Patterson

knew it when he bought the later application. It was in fact a patent in which Kelly and Reynolds were interested, but it was taken out to Cochran and Neer because Cochran was dominating Neer, and wished it done to secure him in some advance he had made about it. As he was the agent for all the parties, he held it in trust, and so recognized himself as a trustee. That patent was not in the line of the title of any of the complainants' patents, and hence there is no constructive notice about its issuance. If Patterson did not himself know that such a patent had issued to Neer and Cochran, it could not mislead him, and could have cut no figure whatever in leading him to presume the relation of the parties ended when the application in question was filed in September of 1893. That he knew the contract between Neer and Kelly and Reynolds was to endure only so long as the parties wished, must be conceded. But why he should assume that an application for a patent, made so soon after he had declined to buy the first Neer machine, and which was to him manifestly intended to escape the charge of infringement which he had brought against the first Neer machine, should be the sole property of Neer, is not explained. Reasonably the presumption, under the facts known to him, was that such an improvement would be for the benefit of the partnership; and, in the absence of very clear evidence otherwise, he should have so assumed. The representation by Neer that he had made no assignment, and his covenant to that effect, is of no importance whatever. He did not even represent that no one had any equitable interest in his invention, and said nothing and was asked nothing about the dissolution of his partnership with Kelly and Reynolds. In view of the facts known to Patterson, the natural inquiry would have been, not, "Have you made any assignment?" but, "Are you equitably under any obligation to do so by reason of your contract with them? When did your agreement to give them an interest in your inventions come to an end?" But if he had caused these questions to be put to him, he would have acted with great negligence if he had failed to inquire of Kelly and Reynolds as to their claim of interest in this particular invention. The assumption that they had no interest in this invention, in view of the facts with which Patterson is chargeable with knowing, rests at last upon the fact that this application had been pending four years, and that no assignment had been recorded of which he was obliged to take constructive notice. In actual fact, an assignment, under date of July 22, 1893, had been spread upon the registry of the Patent Office, by which he had assigned to Reynolds a one-third interest in all of his improvements and inventions in cash registers which he had been working on, and for which he contemplated filing applications. This assignment did not operate as a constructive notice, because it was not such a grant or conveyance as was entitled to registration. *Lynch v. Murphy*, 161 U. S. 247, 16 Sup. Ct. 523, 40 L. Ed. 688; *Carpenter v. Dexter*, 8 Wall. 513, 532, 19 L. Ed. 426; *Prentice v. Duluth Storage Co.*, 58 Fed. 437, 7 C. C. A. 293, 302; *Robinson on Patents*, § 785; *Wright v. Randel* (C. C.) 8 Fed. 591. Neither did it request the commissioner to issue any particular patent to an assignee, and the

commissioner therefore properly ignored it when he came to issue this patent. Rev. St. § 4895; Robinson on Patents, §§ 411, 769, 785; Wright v. Randel (C. C.) 8 Fed. 591. Neither is it shown that Patterson or any of the agents or attorneys of the complainant corporation had any actual knowledge of this document. But on the other hand, it is not shown that any search of the record was ever made to see if any assignment had been recorded. Such an actual search would undoubtedly have disclosed this assignment. There was therefore no actual misleading by the failure of the record to disclose any assignment, for the proper place for such an assignment would have been upon the registry, and not in the file. Rev. St. U. S. § 4895.

The court below, after an exhaustive examination of all the facts and circumstances of the case, reached the conclusion that the facts known to the complainant company at the time of its purchase were such as to put it upon inquiry. The facts which the complainant must be taken to have known pointed plainly to the probable existence of a right or title in conflict with that which they were about to buy. It became complainant's duty, therefore, to make inquiry as to the existence and extent of this probable outstanding equitable, but prior, right; and an inquiry of Neer only was not a reasonable compliance with this duty. The failure to make reasonable inquiry under such circumstances convicts complainant of a degree of negligence inconsistent with the claim to be a bona fide purchaser without notice. The knowledge which its representative in this transaction had did not consist of vague rumors as to the possible rights of another. It was knowledge that tended strongly to show that Kelly and Reynolds were interested in the invention he was about to buy, and was not materially weakened by any subsequent facts known to him at the time he was called upon to act. It may be that Mr. Patterson did not have at the time any purpose to deliberately shut his eyes to the facts which inquiry might disclose, for that would amount to mala fides or fraud, and we do not attribute any evil purpose to him. The price he was asked to pay was a small one for a great concern, such as that he represented. When asked about the extent of his examination of the application before buying, he said:

"I may or may not have examined the file wrapper, and cannot state positively upon this point. If the case was an important one, I should probably have an opinion submitted, or read it over myself. In this case I am under the impression that, the amount involved being so small, that I told Mr. Macauley he might buy the patent if the amount did not exceed \$200. That is about all I remember about it."

Under such circumstances, he may well say, as he does, that he at the time had no knowledge that any one beside Mr. Neer owned or claimed any interest in the invention. But he did have information which made it his duty to inquire whether others did not have an interest in this inchoate property, and this he doubtless would have done but for the comparative insignificance of the matter, which induced a very negligent method of action, which justly deprives his corporation of its claim to be a bona fide purchaser without notice. Evidence of a fraudulent purpose or conduct amounting to moral

turpitude is not necessary to deprive a purchaser of a legal title of the advantages of his position.

The English cases for a time seemed to tend toward a rule requiring evidence indicating a deliberate shutting of the eyes to avoid light, and amounting to what some of the judges styled fraud. 2 Pom. Eq. § 606, and notes, and cases there cited. But the latest announcement seems to repudiate this extreme view. *Oliver v. Hinton*, 2 L. R. Ch. D. 1889, 264. The test of the American courts has not been so extreme. The inquiry has generally been whether the facts known were such as to put a reasonably prudent man upon his guard, and whether an inquiry has been prosecuted, with reasonable diligence. 2 Pom. Eq. § 606, and notes. The latest announcement of the Supreme Court of the United States is that found in *Stanley v. Schwalby*, 162 U. S. 255, 276, 16 Sup. Ct. 754, 763, 40 L. Ed. 960, where Justice Gray said:

"But in order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or at least of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person."

The decree of the court below must be affirmed.

(129 Fed. 124.)

NATIONAL METER CO. v. NEPTUNE METER CO. et al

(Circuit Court of Appeals, Third Circuit. February 22, 1904.)

No. 14.

1. PATENTS—NOVELTY—WATER METERS.

The Nash patents, No. 527,534 and No. 527,537, for improvements in disk water meters, are void for lack of novelty, and also because the claims of the former are so broad as to cover practically everything in the prior art.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 122 Fed. 82.

J. Edgar Bull and Edmund Wetmore, for appellant.

Alfred W. Kiddle and William A. Redding, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This bill was brought to restrain infringement of two letters patent, No. 527,534 and No. 527,537, for improvements in disk water meters, granted on October 16, 1894, to the National Meter Company (complainant-appellant), as assignee of Lewis Hallock Nash. At the date of the making of the improvements in question, water meters of the disk type were old and in successful use. The structure described and shown in and by each of these patents, in shape, size, constituent parts, arrangement, and mode of operation, was old. The form and function of each of the constituent parts of the described structure are identical with those which had long been in common use prior to the alleged inventions. Moreover, all the ma-

terials specifically mentioned in these patents had previously been employed in various combinations in the manufacture of water meters. The learned judge below, in the course of his opinion, after particular reference to certain prior patents, justifiably said:

"It will thus be seen that metals and nonmetallic substances of the character specified, for one or the other of the different parts of a nutating meter, have been freely suggested and employed by other prior inventors, until there is hardly a combination of them which could be devised that would be in any respect new."

Patent No. 527,534 is much the broader of the two patents in suit, patent No. 527,537 being merely for one species or a particular form of the alleged invention of the other patent. The following explanatory paragraph of the specification of No. 527,534 sets forth alleged advantages possessed by the described structure:

"The disks of nutating pistons heretofore made have been comparatively fragile and liable to break. By making the disk of metal I altogether avoid difficulty. However, if both piston and case were made entirely of metal, the friction and wear occurring would make the structure of little or no value as a practical water meter. As the principal friction surfaces are at the ball of the piston and its seat in the case, by making these parts of different materials—for instance, one of metal and the other of nonmetallic material—the friction and wear become very slight. Thus the maximum strength and the minimum friction and wear are obtained, and a durable and efficient meter is made. Such a piston can be used in any suitable case. If the piston, as I prefer to make it, have a disk of metal and a ball of nonmetallic material, it may be used in a case composed of any material or materials, for but little friction and wear will be developed in the ball bearing, even if the seat in the case be of the same or similar nonmetallic material—as, for example, if both be made of hard rubber. When the walls of the case as well as the disk of the piston are made of metal, while the seat and ball are either both of nonmetallic material, or one is of nonmetallic material and the other is of metal, the wear on the opposing metallic surfaces, particularly between the spherical walls of the case and the rim of the piston, will, other things being equal, be faster than at the other parts, and hence the weight of the piston will always be supported on the ball bearing, where friction is least, and friction contact between the edge of the piston and the spherical walls of the case avoided."

The specification contains the further statement:

"In the claims I employ the words 'coefficient of abrasion' to indicate the rapidity with which wear will take place between opposing surfaces."

The widest claims of this patent and the ones particularly relied on by the complainant are the first and second claims, and those only we deem it necessary to quote. They are as follows:

"(1) In a water meter, a nutating piston, composed of ball and disk, combined with a case provided with seats for the piston ball, the disk of the piston and the spherical walls of the case being composed of substances having a larger coefficient of abrasion than the substances composing the ball of the piston and its seats in the case.

"(2) In a water meter, the disk of a nutating piston and the opposing case walls, made of similar materials, combined with the ball of said piston and the ball bearings in the case, made of dissimilar materials."

The specification of patent No. 527,537 repeats the statement that:

"As the principal friction surfaces are at the ball of the piston and its seat in the case, by making the ball of metal and its seat in the case of a nonmetallic material the friction and wear become very slight."

The single claim of this patent reads thus:

"In a water meter, the combination of a piston composed of a ball and disk, both made of metal, with a case made of metal and a seat for the ball made of nonmetallic material."

The charge of infringement made against the defendants below (the appellees) is based upon their manufacture and sale of two slightly different types of disk water meters, the structures of both of which, in form, constituent parts, and method of action, are conformable to this art as practiced before the alleged inventions of the patents in suit. One of the meters complained of is constructed with an all-metal case having all-metal seats for the ball of the piston, and a metal disk having a rubber ball for its journal. The other meter complained of is made under the Thomson patent, No. 568,642, of September 29, 1896, and has for the lower bearing of the metal ball of the piston a skeleton of metal provided with concentric blocks of graphite mounted in recesses in the metal socket. The alleged infringement lies in the combined use of the materials mentioned. Do these constructions, or either of them, violate any exclusive rights vested in the complainant by virtue of the patents in suit? The conclusion of the Circuit Court was adverse to the complainant's pretensions, and we think rightly so.

According to the explicit statement of both the patents in suit, the principal place of friction is at the ball of the piston and its seat in the case. Upon this assumption the patents rest. It is the basis of the alleged invention. The problem was to secure the minimum of friction and wear between the ball of the piston and its seat. That being obtained, the invention is realized. The specification of No. 527,534 states that by making the ball of the piston and its seat in the case "of different materials—for instance, one of metal and the other of nonmetallic material—the friction and wear become very slight"; and "thus the maximum strength and the minimum friction and wear are obtained, and a durable and efficient meter is made." What the patents unmistakably prescribe is an antifriction bearing for the ball. But that was an old and common expedient in water-meter construction. This is abundantly shown by the evidence. The specifications here do not disclose any new means for reducing friction between the ball of the piston and its seat in the case. It was a well-known fact that friction and wear between a journal and its bearing can be reduced by making these parts of dissimilar materials. This principle was of common application in machine construction before the date of the alleged inventions. The nonmetallic materials specifically mentioned in the complainant's patents are *lignum vitæ*, hard rubber, and vulcanized fiber. Now, the use of *lignum vitæ* for precisely the same purpose is described in Nash's patent, No. 379,805, of 1888; and the use of hard rubber for a piston ball working in a metallic seat is described in the same patent, and also in the Davies patent, No. 384,024, of 1888, and the British patent to Davies, No. 13,571, of 1886. The prior Nash patent above mentioned discloses a water meter almost identical with the structure of the patents in suit composed of an all-metal case with an all-metal piston, or of a hard rubber case with a hard rubber piston; the ball of the piston, whether of metal or hard rubber, having for its lower bearing or seat a plug of

lignum vitæ. Upon a fair review of earlier patents, the judge below made the clearly warrantable deduction that the very combination of materials suggested in the complainant's patent is to be found in the prior art, not as a matter of accident or undesigned, but definitely and distinctly indicated and provided for.

The brief of the appellant puts forward the proposition that "the gist of the patents in suit resides in the discovery that the piston can be made to maintain automatically the necessary clearance at its rim by putting there materials which wear away or abrade faster than the materials forming the ball and its socket," and it is said that the invention consists in the "paradoxical expedient" of increasing friction and abrasion between the edge of the piston and the chamber walls. It is difficult, if not impossible, by searching, to find out anything in the specifications tending to support this ingenious theory. As we have already seen, the inventor states that the principal friction surfaces are at the ball of the piston and its seat in the case, and that, by making these parts of different materials, the friction and wear become very slight. "Thus," the specification goes on to say, "the maximum strength and the minimum friction and wear are obtained and a durable and efficient meter is made," and it is added that "such a piston can be used in any suitable case." It is true that further on in the specification occurs the rather obscure statement that:

"When the walls of the case, as well as the disk of the piston, are made of metal, while the seat and ball are either both of nonmetallic material, or one is of nonmetallic material and the other is of metal, the wear on the opposing metallic surfaces, particularly between the spherical walls of the case and the rim of the piston will, other things being equal, be faster than at the other parts, and hence the weight of the piston will always be supported on the ball bearing, where friction is least, and friction contact between the edge of the piston and the spherical walls of the case be avoided."

If, however, friction contact between the edge or rim of the disk of the piston and the walls of the case be avoided, there can be no automatic clearance by abrasion. There may be friction without abrasion, but there cannot be abrasion without physical contact. This is a self-evident proposition. Even the appellant's expert assents to this.

But furthermore we are convinced by the proofs that the theory of automatic maintenance of adequate clearance between the rim of the disk of the piston and the walls of the case by abrasion is incapable of practical realization. We think that the patents themselves are opposed to such theory. As we read the specifications, the main thing to be done is to minimize the friction and wear between the ball of the piston and its seat, to the end that the piston shall "always be supported on the ball bearing," and "friction contact between the edge of the piston and the spherical walls of the case be avoided." Aside, however, from the patents, the clear weight of evidence is against the realization, in practice, of the appellant's theory of operation. Mr. Thomson, an engineer and a manufacturer of water meters, out of his large experience testifies thus:

"I do not believe, nor have I ever seen in practice, nor have I ever seen a practical demonstration in which, once the periphery of the disk is brought into contact with the spherical wall of the casing, it will then automatically

produce 'an adequate clearance.' * * * No such result would be obtainable in practice."

It is very significant that the complainant deliberately abandoned the construction shown and described in its patent No. 527,537. In its catalogue of 1900 it is said:

"A third plan is to use an all-metal disk, which is a combination long ago abandoned as being thoroughly unsatisfactory, both as to durability and close registration."

Moreover, it appears that the complainant had adopted and exclusively employs in its manufacture of disk water meters a construction in which the meter has an all-metal case, with all-metal sockets, and a piston composed of a hard rubber ball and disk, the disk being reinforced with metal embedded in and completely covered by the rubber, and shaped at its periphery into the form of a knife-edge composed wholly of rubber. Obviously, this construction is designed to diminish friction and wear between the rim of the piston and the chamber wall, not to increase friction and abrasion at that place. It will be noted that, in this construction, reliance is put upon the mechanical conformation of the periphery of the disk. This construction of disk water meters is made under a later patent, No. 527,539, granted to the complainant as assignee of Nash.

The claims of the patents in suit have an extraordinary sweep. They take in the whole range of substances or materials fit for water-meter construction whether heretofore used or not. They also embrace an unlimited number of combinations. The complainant's expert expressed the opinion that, "where the construction is such that the wear between the ball and its seat is less or more retarded than between the periphery of the disk and the inside wall casing, the alleged invention would be realized." He also expressed the opinion that a water meter of the knife-edge form of disk, made under patent No. 527,539, falls within the claims of the principal patent in suit, No. 527,534. If these views, which the appellant urges, be sound, and the defendants' water meters also are covered by those claims, it is safe to say that no practicable disk water meter can be made which could escape this monopoly, for an antifriction bearing at the ball of the piston is necessary to successful working—a fact which has always been recognized in this art.

We are of opinion that the learned judge below was entirely right in dismissing the complainant's bill, and the decree of the circuit court is affirmed.

(129 Fed. 128.)

McCARTHY v. WESTFIELD PLATE CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 127.

1. PATENTS—INFRINGEMENT—CASKET HANDLES.

The McCarthy patent, No. 478,168, for improvements in casket handles, claim 1, construed, and held not infringed by the device of the Klein patent, No. 559,898, in which the improvement, while having the same general purpose of strengthening the handle, does so by means which operate on a different principle.

Appeal from the Circuit Court of the United States for the District of Connecticut.

For opinion below, see 124 Fed. 897.

Howard P. Denison, for appellant.

Harold Binney, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. We agree with the conclusions of the court below that the defendant's coffin handles, made conformably with letters patent No. 559,898 (granted to Klein, assignor, May 12, 1896), do not infringe the complainant's patent; and this being so, it will not serve any useful purpose to consider whether the claim in controversy is void for want of patentable novelty, or void because the alleged invention had in all essentials been previously patented by the complainant.

The patent in suit is for an improvement in folding-down handles, more particularly burial casket handles, which consists in providing an auxiliary support to the handle by means of a relief-bar connected with the handle-bar. In a prior patent to the complainant (No. 469,975, granted March 1, 1892) a cognate improvement was described and claimed, the general nature of which was stated to consist "in providing the handle with an auxiliary support or brace which will remove a part of the strain from the hinge-pins by which the handle arms are connected to the body-plates, and which, in case said pins break, will constitute the main support of the casket." The present patent covers a modification of the auxiliary support of the prior patent, and, without any other reference to the prior art, that patent itself imposes a limitation upon the construction of the present patent which restricts the application of the doctrine of equivalents.

In the folding-down handle in common use previous to either of the McCarthy patents the handle was carried by an arm attached to the body-plate of the casket by a hinge-pin pivoted in the ears of the body-plate. These ears projected from the sides of a recess in the body-plate formed to receive and afford a bearing to the end of the arm. The end of the arm was provided with a shoulder extending rearwardly beyond the hinge-pin, which when the arm was raised engaged with the top of a wall at the rear of the recess so as to limit the upward movement of the handle. The specification of the patent in suit describes the old folding-down handle with an additional recess in the body-plate consisting of an elongated slot through its outer face. It also describes a supplemental arm, called a relief-bar, which is secured rigidly or pivotally to the main arm near the handle, and extends beneath the main arm to and through the slot in the body-plate, where it engages with the inner face of the body-plate. To effect this engagement, it is provided with a head larger than the width of the slot. This bar is arranged and constructed so as to move with the main arm, but to have independent bearing connections with the body-plate. In operation when the handle is moved downwardly the bar will slide under the body-plate, and when the handle is raised the bar is drawn

out through the slot until its head engages with the inner face of the body-plate. By this engagement the bar relieves the strain on the hinge-pin, and if the hinge-pin breaks receives the whole strain and supports the casket. Thus the folding-down handle of the patent is the old device with an additional handle-arm movably attached to the body-plate by a slot and head engagement; the main arm and its hinge attachment to the body-plate are the main arm and attachment of the old device, and do their work precisely as they did in the old device; and the bar or new arm, and its attachment, do their work precisely as they would if the bar was rigidly or pivotally fastened to the handle instead of the main arm and there were no main arm.

The claim is as follows:

"The combination, with the handle, the arm carrying it, and the body-plate to which said arm is hinged, of a relief-bar connected to said arm and passing through a slot in said plate, and provided on its inner end with a head."

The only novelty in the combination of the claim resides in the peculiar organization of the relief-bar and the body-plate, and except in this respect it is the same combination described in the earlier patent to complainant. In the earlier McCarthy patent one form of the auxiliary support consists of an additional arm at one end pivotally connected with the handle-arm and at the other end provided with a T-shaped head which slides in a T-shaped groove in the body-plate. In this construction the supplemental arm moves with the main arm, and when the handle is raised to the extent permitted by the hinge connection of the main arm it engages in the end of the groove, and thus relieves the strain on the hinge-pin, and receives the whole strain in case the hinge-pin breaks.

The defendant's handle contains the parts employed in the old folding-down handle, and as therein combined, together with parts which re-enforce and strengthen the handle-arm and its bearings at the hinge-joint; but it does not contain the relief-bar of the claim, nor the slotted body-plate of the claim. Its handle-arm is strengthened throughout its entire length by a piece of sheet steel incorporated within the arm which at the body-plate end has a projection which extends beyond the pivot and rests upon one of the walls in the recess when the handle is raised. In all the parts except those that were employed in the old folding-down handle the defendant's handle differs so greatly in details of construction from the complainant's handle that it is difficult to compare them; but the most accentuated differences are those of principle. It contains no parts which relieve the strain upon the hinge-pin when the handle is raised, or which provide a support for the casket in the event of the breaking of the hinge-pin. Both McCarthy and Klein by their several endeavors have sought to improve upon the old folding-down handle, McCarthy endeavoring to do so by what is properly a secondary arm with independent body-plate connections, and Klein by strengthening the old arm and its hinge connections. As was said in the opinion of the court below by Judge Platt:

"The former departs in one direction, and the latter in another. The patent in suit is the outcome of a struggle to relieve the hinge-pin. The Klein patent is the outcome of a struggle to so strengthen the handle as to overcome the natural strain at the vital point."

The decree is affirmed, with costs.

(128 Fed. 907.)

CITY OF SEYMOUR v. FARMERS' LOAN & TRUST CO. OF NEW YORK.*

(Circuit Court of Appeals, Seventh Circuit. October 23, 1903.)

No. 954.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—RIGHT OF ACTION.

Plaintiff, a citizen of New York, and M., a citizen of Indiana, were trustees under a mortgage executed by an Indiana corporation to secure bonds, in which water hydrant rentals due from defendant, a city of Indiana, were pledged as security; but the mortgage provided that the corporation should receive such rentals until default in the payment of interest on the bonds. The ordinance, however, under which the franchise to the corporation was granted, provided that the rentals in question should be paid to a trustee as the grantee or his assigns might elect, and plaintiff was appointed such trustee. *Held*, that the trust created by the ordinance was separate from that created by the mortgage, and hence plaintiff was entitled to sue therefor in the federal courts sitting in Indiana, without joining the co-trustee mentioned in the mortgage.

2. SAME—ASSIGNMENTS.

Where a city ordinance, under which a water franchise was granted, provided that hydrant rentals should be paid to plaintiff, a nonresident corporation, as trustee, the fact that the original ordinance granting the franchise was not to the water company, but to M. and his assigns, who assigned the same to the water company, and that both M. and the company were citizens of the same state, did not preclude the trustee from bringing an action to recover such rents in the federal court, under Act Cong. Aug. 13, 1888, § 1, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], which provides that an assignee cannot bring an action based on an assignment in the federal courts, unless his assignor could have done so had no assignment been made.

In Error to the Circuit Court of the United States for the District of Indiana.

Byron K. Elliott and Joseph H. Shea, for plaintiff in error.

Merrill Moores, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. The action in the court below was brought by the Farmers' Loan & Trust Company, a citizen of New York, against the city of Seymour, a municipal corporation of Indiana, to recover rentals for city hydrants due from the city to the Seymour Water Company, also a citizen of Indiana. The suit was thus by a citizen of New York, trustee of the Seymour Water Company, a citizen of Indiana, against a municipal corporation of Indiana.

On the merits of the case the judgment below was without error, and can be affirmed without discussion. The principal questions that arise relate to jurisdiction.

The plaintiff below, defendant in error here, is trustee, along with one Merrill Moores, a citizen of Indiana, under a mortgage executed by the Seymour Water Company to secure an issue of its bonds, in which mortgage the rentals in question due the city, along with the real estate and personal property of the water company, are pledged as security; but the trust deed contains a provision that until default in

*Rehearing denied April 12, 1904.

the payment of interest the water company should remain in possession of the rentals, tolls, and revenues as fully as though the deed of trust or mortgage had not been made, and free from the control and intervention of the trustees. If the action under review be under the authority of such mortgage and pledge, jurisdiction fails, because Moores, a citizen of Indiana, would in such case be an indispensable party.

But the ordinance under which the franchise was granted provided that there should be paid to such trustee, as the grantee or his assigns may elect, the rentals in question, which rentals shall be devoted by such trustee to the payment of interest charges on the bonds. Taking this provision of the ordinance, in connection with a certificate by the city that the Farmers' Loan & Trust Company has been designated as such trustee, no default having occurred in the payment of interest, we are of the opinion that the trust created by the ordinance is separate from the trust created by the mortgage; from which it follows that Moores, not named in the ordinance trust, is not an indispensable party, and that the suit was rightly brought by the Farmers' Loan & Trust Company without joining him.

The original ordinance, however, was not to the Seymour Water Company, but to Willet E. McMillan, his heirs and assigns, McMillan subsequently assigning the same to the Seymour Water Company. The Farmers' Loan & Trust Company, of course, derives its title from the ordinance and trust agreement between the city of Seymour and McMillan. It is insisted that the Seymour Water Company is assignee of McMillan, whose citizenship is not averred, and from this argued that jurisdiction in the federal court cannot be maintained. Without discussing this question, we are content to rest our conclusion in favor of jurisdiction upon the authority of *Superior City v. Ripley*, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914.

The judgment of the Circuit Court is affirmed.

(128 Fed. 908.)

KRUGER v. CONSTABLE et al. (two cases).

(Circuit Court of Appeals, Second Circuit. March 10, 1904.)

No. 123.

1. FEDERAL COURTS—WAIVER OF JURY—FINDINGS—REVIEW ON ERROR.

Where writs of error are prosecuted in cases tried to the court on stipulation waiving a jury trial, as authorized by Rev. St. U. S. § 649 [U. S. Comp. St. 1901, p. 525], providing that under such circumstances the court's findings of fact shall have the effect of a verdict of a jury, the court of appeals is limited to reviewing exceptions taken to the admission or exclusion of evidence, and to rulings on question of law.

2. DEEDS—WARRANTY OF TITLE—EVIDENCE.

In an action for breach of a warranty of title, a prior contract for the sale of the property, though inadmissible to contradict or vary the terms of the deed containing the warranty, was competent to show that the grantees, prior to the execution of the conveyance to them, knew of the existence of a certain map which included the property conveyed.

3. SAME.

In an action for breach of a warranty of title, certain deeds and mortgages made by plaintiff's grantors were admissible, as bearing on the

question of an alleged dedication by plaintiff's grantors while in possession of the property.

4. SAME—PROCEEDINGS IN OTHER COURTS—RECORD—EFFECT.

The proper admission, in an action for breach of a warranty of title, of the record of certain certiorari proceedings in a state court, did not render evidence in such proceedings admissible to prove the facts as against the parties to the case at bar.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 116 Fed. 722.

These two causes come here upon writs of error to review the judgments entered therein, dismissing the complaints in actions brought to recover damages for breach of warranty of title.

J. Delahunty, for plaintiff in error.

Jacob F. Miller, for defendants in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. These cases were heard and determined by the court upon a written stipulation, filed with the clerk, waiving a jury trial, under Rev. St. U. S. § 649 [U. S. Comp. St. 1901, p. 525]. The court has filed an exhaustive opinion reviewing all the facts, and finding that, upon the evidence, there is no proof to support the cause of action. Such finding has the same effect as the verdict of a jury. Rev. St. U. S. § 649; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *Hathaway v. Cambridge National Bank*, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004.

On these writs of error, therefore, this court is confined to a review of exceptions taken to the admission or exclusion of evidence, or to rulings upon questions of law. Rev. St. U. S. § 700 [U. S. Comp. St. 1901, p. 570]; *Walker v. Miller*, 59 Fed. 869, 8 C. C. A. 331; *Mercantile Trust Co. v. Wood*, 60 Fed. 346, 8 C. C. A. 658.

Two exceptions only were taken in the course of the trial. One was founded upon an objection to the introduction of a prior contract for the sale of the property in question, on the ground that said contract was merged in a subsequent deed to plaintiff's grantors. This evidence was not admissible to contradict or vary the terms of the deed, and it does not appear that it was admitted for any such purpose. It was clearly admissible to show that the grantees, prior to said conveyance to them, knew of the existence of a certain map which included said lots.

The other exception is founded upon a formal objection to the introduction of certain deeds and mortgages made by plaintiff's grantors. This evidence was admissible as bearing upon the question of an alleged dedication by plaintiff's grantors while in possession of the property. This exception, however, is not discussed in the brief, and was not referred to in the argument of counsel.

Counsel for plaintiff does not question the correctness of the rulings of the court upon the questions of law, but only contends that the findings are not supported by the evidence. In view of the stipulation, these facts are not open to review in this court. The fatal error on

which his contention is based is that, because the record of certain certiorari proceedings in the New Jersey courts was properly admitted in these cases, the evidence therein is admissible to prove the facts as against the parties herein.

Independently of these considerations, however, we have examined the record and are satisfied that, in any view of the case, the conclusion reached by the court below was correct, and that there was no proof of a dedication of the land in question before the execution and delivery of the deeds to plaintiff's grantor.

The judgments are affirmed.

(128 Fed. 910.)

UNITED STATES v. BLENDIAUR.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1904.)

No. 973.

1. PUBLIC LANDS—FOREST RESERVES—LANDS SUBJECT TO BE SET APART.

The 15 townships of land in the Bitter Root Valley, Mont., formerly occupied by the Flathead Indians, which by Act June 5, 1872, c. 308, 17 Stat. 226, providing for the removal of the Indians therefrom, were made subject to sale, and to which the homestead laws were extended by Act Feb. 11, 1874, c. 25, 18 Stat. 15, became a part of the general public domain, and, as such, were subject to Act March 3, 1891, c. 561, 26 Stat. 1103 [U. S. Comp. St. 1901, p. 1537], authorizing the President, by proclamation, to set apart forest reservations in "public lands."

2. SAME—CONSTRUCTION OF STATUTE—MEANING OF WORDS "PUBLIC LANDS."

The words "public lands" are not always used in the same sense in acts of Congress, and should be given such meaning in any act as comports with its purpose and intent.

In Error to the District Court of the United States for the District of Montana.

For opinion below, see 122 Fed. 703.

This action was instituted by the United States to recover from the defendant the sum of \$28, the value of 20 trees alleged to have been wrongfully cut by him on certain lands situate in the Como Reserve, in the Missoula Land District, in the state of Montana. The defendant, in his answer, denies that plaintiff was the owner of the land upon which the trees were cut; denies all damages charged against him; and, for an affirmative defense, alleges that the lands described in the complaint are not, and since the 5th day of June, 1872, have not been, public lands, and that neither the President of the United States, nor any officer thereof, has the right, power, or authority to set apart as, or declare the lands mentioned in the complaint to be, a part of any forest reserve; that the said lands are embraced within the 15 townships above the Lo Lo Fork of the Bitter Root River, in the Bitter Root Valley, referred to in the act of Congress approved June 5, 1872, c. 308, 17 Stat. 226, as such 15 townships have been definitely fixed and determined by the survey and maps of the said Bitter Root Valley approved by the Department of the Interior; that on the 3d day of February, 1892, an order was transmitted by the Commissioner of the General Land Office to the register and receiver of the United States land office at Missoula, Mont., purporting to reserve from disposition, under the general laws of the United States, certain lands in the Bitter Root Valley, embracing the lands described in the complaint herein, and designating the said lands as the "Lake Como Forest Reserve," and that save for the said order, no act was ever done or performed by the President of the United States, or by the Land Department, creating or purporting to

create any forest reserve embracing said lands; that on or about July 14, 1899, the Commissioner of the General Land Office addressed a letter to the receiver of the United States land office at Missoula, Mont., directing the said officer not to dispose of certain lands in the Bitter Root Valley embracing the lands mentioned in the complaint herein, and purporting to set apart and reserve the same, pending the determination of the advisability of including the same in the Bitter Root Forest Reserve, but defendant avers that no action has ever been taken by the President of the United States, or by the Land Department of the government, to embrace or include the same in the said Bitter Root Forest Reserve. Defendant further avers that he is, and at all times herein mentioned was, a citizen of the United States, over the age of 21 years, and that he has never entered any lands under the provisions of the homestead act, and that on the 15th day of July, 1899, he settled on the lands mentioned in the complaint herein with the intention at that time to enter the same and acquire title to the same under the provisions of the homestead laws of the United States; that, with a view to the perfection of his settlement upon the said lands, and to enable him to construct a house thereon and to establish his residence thereon, he cut down certain trees growing thereon, intending to use the logs which might be hewn therefrom to construct a residence for himself upon the said land, and that the said trees so cut down were used by the defendant on the said land in constructing his said residence, and that the trees so cut down are the trees referred to in the complaint herein as having been on the said land wrongfully and unlawfully cut down, and that the use of the same in the construction of his said residence constitutes the conversion and disposition of the same referred to in the complaint; and that the entry so as aforesaid made by the defendant upon the said lands for the purpose of making a settlement thereon, with a view to acquire title to the same under the homestead laws of the United States, constitutes the entry complained of in the complaint, and, by reason of the facts aforesaid, the defendant denies that his said entry was wrongful or unlawful, or that his cutting of the said timber was wrongful or unlawful, or that he converted the same. To this answer the plaintiff interposed a demurrer upon the grounds "that the affirmative allegations contained in said defendant's answer did not, nor did either or any of them, state facts sufficient to constitute a defense to the cause of action set out in plaintiff's complaint herein." The court below overruled this demurrer. The plaintiff declined to file any replication to the answer, and elected to stand upon its demurrer, whereupon the court ordered the complaint dismissed. From the judgment of dismissal the plaintiff sued out a writ of error to this court, assigning as error: "(1) The court erred in overruling the demurrer interposed by the plaintiff to the affirmative matter set up in defendant's answer. (2) The court erred in rendering judgment in said cause against said plaintiff and dismissing said action."

Carl Rasch, U. S. Atty., and Fred A. Maynard, Sp. Asst. U. S. Atty. E. E. Hershey and T. J. Walsh, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

Did the court err in overruling the demurrer to the answer? Was the land described in the complaint subject to homestead entry on the 15th day of July, 1899, when defendant entered thereon for the purpose of making a settlement under the homestead law, as alleged in his answer, or had the land at that time or prior thereto been legally set apart and reserved as a forest reservation?

Section 24 of the act of March 3, 1891, reads as follows:

"That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in

any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof." 26 Stat. 1103, c. 561 [U. S. Comp. St. 1901, p. 1537].

The contention of appellee is that the land in question could not be legally set aside as a part of a forest reservation, because the lands in the Bitter Root Valley above the Lo Lo Fork were not "public lands," but had been previously set apart for a special purpose, to wit, the right of homestead entry under the provisions of the act of June 5, 1872, and the act approved February 11, 1874, and the appropriation act of June 22, 1874, the respective provisions of which read as follows:

Act of June 5, 1872, c. 308, 17 Stat. 226:

"Section 1. That it shall be the duty of the President, as soon as practicable, to remove the Flathead Indians (whether of full or mixed bloods), and all other Indians connected with the said tribe, and recognized as members thereof, from Bitter Root Valley, in the territory of Montana, to the general reservation in said territory (commonly known as the Jocko Reservation), which by a treaty concluded at Hell Gate, in the Bitter Root Valley, July sixteenth, eighteen hundred and fifty-five, and ratified by the Senate March eighth, eighteen hundred and fifty-nine, between the United States and the confederated tribes of Flathead, Kootenai, and Pend d'Oreille Indians, was set apart and reserved for the use and occupation of said confederated tribes."

Act of February 11, 1874, c. 25, 18 Stat. 15:

"Section 1. The time of sale and payment of pre-empted lands in the Bitter Root Valley, in the territory of Montana, is hereby extended for the period of two years from the expiration of the time allotted in the act entitled 'An act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley, in the territory of Montana,' approved June fifth, eighteen hundred and seventy-two.

"Sec. 2. That the benefit of the homestead act is hereby extended to all the settlers on said lands who may desire to take advantage of the same."

Appropriation act of June 22, 1874, c. 389, 18 Stat. 173:

"For the second of ten installments to be paid, under direction of the President, to the Flathead Indians removed from the Bitter Root Valley to the Jocko Reservation, in the territory of Montana, five thousand dollars: provided, that the proceeds of the sales of land in Bitter Root Valley, Montana Territory, referred to in the second section of the act of Congress approved June fifth, eighteen hundred and seventy-two, entitled 'An act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley, in the territory of Montana,' shall be paid into the Treasury of the United States in the same manner that other moneys derived from the sale of other public lands are now paid in: and provided further, that in lieu of the amount provided to be set apart therefrom by the act of Congress of June fifth, eighteen hundred and seventy-two, hereinbefore referred to, there shall be annually appropriated out of any money in the Treasury of the United States not otherwise appropriated, the sum of five thousand dollars, for the period of ten years, to be expended under the direction of the President, in the manner deemed for the best good of the Indians who have been removed from Bitter Root Valley: and provided further, that no part of said sum shall be paid to any Indian of said tribe who shall not have settled upon the Jocko Reservation."

Lands to which a homestead claim may attach must necessarily be a part of the general public domain, and must be unappropriated lands not held back or reserved for any special or public purpose. It will

be admitted, for the purposes of this opinion, that prior to the order made on February 3, 1892 (set forth in defendant's answer), the lands in the Bitter Root Valley above the Lo Lo Fork were subject to homestead entry, and that the rights of parties who had entered in good faith for the purpose of making a settlement thereon could not be divested by said order. But the withdrawal of the lands for forestry purposes was not in violation of any of the provisions of the act of June 5, 1872. The lands were ceded by the Indians, and their sale was directed by said act. There was no reservation of the lands or of any interest therein to the use of the Indians—only an appropriation arising from the sale. That appropriation was satisfied by the act of June 22, 1874, from the general funds of the Treasury. The government had the power and could at any time thereafter reserve the lands for any public purpose. They were subject to reservation for public purposes, the same as other public lands. The contention of appellee that they were not public lands, because these words indicate only such lands belonging to the United States "as are subject to sale or other disposition under general laws" (*Wilcox v. Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769; *Bardon v. R. R. Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714; *Barker v. Harvey*, 181 U. S. 481, 491, 21 Sup. Ct. 690, 45 L. Ed. 963), cannot be sustained. The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. There are many cases where the courts have been called upon to decide the meaning of these words. In *United States v. Bisel*, 8 Mont. 20, 30, 19 Pac. 251, the court, after referring to the decisions in *Wilcox v. Jackson*, *Newhall v. Sanger*, and other cases, said:

"There is no statutory definition of the words 'public lands,' and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use."

See, also, *Heydenfeldt v. Daney G. & S. M. Co.*, 10 Nev. 290, 314; *Id.*, 93 U. S. 634, 640, 23 L. Ed. 995; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440; *Frost v. Wienie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; *Minnesota v. Hitchcock*, 185 U. S. 373, 393, 22 Sup. Ct. 650, 46 L. Ed. 954; *McFadden v. Mountain View M. & M. Co.*, 97 Fed. 670, 680, 38 C. C. A. 354; *State v. Kennard* (Neb.) 78 N. W. 282; *Rierson v. St. Louis & S. F. Ry. Co.* (Kan. Sup.) 51 Pac. 901.

The title to the land in question was, at the time of the passage of the act of March 3, 1891, in the government. The land was a part of the public domain, and was public land of the United States, within the true intent and meaning of those words, as used in section 24 of said act, and continued in that condition up to the time the orders were issued setting aside and reserving said land as a part of the forest reserve, and thereafter was not subject to homestead entry. Blendiaur,

therefore, was at the time he cut the trees in question a mere trespasser upon the land. His answer stated no defense to the action, and the demurrer interposed thereto should have been sustained.

The judgment of the District Court is reversed.

(128 Fed. 914.)

BATON ROUGE & B. S. PACKET CO. et al. v. GEORGE.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,276.

1. SHIPPING—PILOTS—EMPLOYMENT—CONTRACTS.

Where a steamboat was engaged in the regular coasting trade on inland rivers, a contract for the employment of a pilot for the term of one year, at the rate of \$100 per month, payable weekly by the master of such vessel, was reasonable and binding on the vessel.

2. SAME—APPEAL—FINDINGS OF DISTRICT JUDGE—REVIEW.

On a libel in admiralty for breach of a contract for the employment of a pilot, a finding by the District Judge, on conflicting evidence, that a time contract was in fact made, would not be set aside on appeal as contrary to the weight of evidence.

Appeal from the District Court of the United States for the Eastern District of Louisiana, in Admiralty.

The following is the statement of the case and the opinion of the District Judge:

This is a libel in rem by George George, who avers that he was employed as pilot on board the steamer Julien Poydras for the term of one year, at the rate of \$100 per month, payable weekly; that under the contract he performed his duties as pilot from September 20, 1901, until December 23, 1901, when the vessel was laid up and the libellant was discharged. He sues for the balance of his wages under the contract, viz., for \$898.87. The claimant answered denying that the contract was for a term of one year, and averred that the employment was a hiring at will, and not for a definite period, and that all wages due him were paid to him on his discharge. The evidence showed that libellant earned as pilot on another vessel \$480.32 between his discharge in this case and September 20, 1902.

PARLANGE, District Judge. It is perfectly clear that the libellant had a binding contract with the boat for a fixed term, as claimed by him, and that he was discharged without cause. The master has admitted the contract. This contract was a reasonable and proper one under the circumstances disclosed by the evidence, and the boat should be held to it.

The contract was executed in part. Its continuation and completion was prevented by the boat, and not by any act or omission of the libellant.

It is clear that the libellant is entitled to recover the damages which the breaching of the contract has caused him, and that he has a lien on the boat for such damages. Among other cases, see *The Wanderer* (C. C.) 20 Fed. 653, by Circuit Judge Woods, concurred in by Mr. Justice Bradley; *The Mary Elizabeth* (C. C.) 24 Fed. 397, by Circuit Judge Pardee; *The Oscoda* (D. C.) 66 Fed. 347, by Judge Cox; Judge (now Mr. Justice) Brown in *Scott et al. v. The Ira Chaffee* (D. C.) 2 Fed. 401, especially at pages 401 and 403.

But the wages which the libellant earned after his dismissal from the *Julien Poydras* must be deducted from the aggregate claimed by him in his libel. Two adjudicated cases were cited in behalf of the libellant, in which it was held that certain set-offs to mariners' wages would not be allowed. These authorities are sound, but they do not apply. This is not a suit for mariners' wages; it is a suit for compensatory damages for the breach of a contract. The deductions should be made. See Judge Benedict in *Fee et al. v. Orient Fertiliz-*

ing Co. (D. C.) 36 Fed. 509. Notice *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406, especially at pages 361, 362, 115 U. S., and pages 94, 95, 6 Sup. Ct., 29 L. Ed. 406.

There will be a decree in favor of the libellant for the aggregate claimed by him, less the amount he earned, within the term of the contract, after his discharge from the *Julien Poydras*.

Bernard Bruenn, for libellant.

John D. Grace, for Claimant *Baton Rouge & Bayou Sara Packet Co.*

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is an appeal from a decree in rem to enforce a time contract for the employment of a pilot on the steamboat *Julien Poydras*, running in the regular trade on the Mississippi and Atchafalaya rivers. That contracts for a reasonable time can be made for the employment of pilots on boats engaged in making regular trips in the coastwise trade is settled in this circuit by *The Wanderer* (C. C.) 20 Fed. 655, and *The Mary Elizabeth* (C. C.) 24 Fed. 398.

The only open question on this appeal, therefore, is whether such a contract was made between the libellant, George George, and the master of the *Julien Poydras*. On this question the evidence is not only confused, but very conflicting, and, if the case were before us as an original proposition, we might well find on the evidence adduced that the alleged contract is not sufficiently proven. As the case is now before us on appeal, however, we find that the learned District Judge, reviewing the question in an opinion transmitted with the record, has found that the contract was proved, and, as he says, "admitted by the master." To now hold otherwise would be merely to substitute our conclusion on evidence for that of the District Judge when we are by no means satisfied that error can be predicated on his finding.

Under these circumstances, the majority of this court are of opinion that the decree appealed from should be affirmed; and it is so ordered.

(128 Fed. 915.)

FLORENCE COTTON OIL CO. v. ALABAMA TOWBOAT CO.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,305.

1. ADMIRALTY—MARITIME CONTRACT—BREACH—DAMAGES.

A contract by the master of a steamboat to collect and transport certain cotton seed from one port to another within a reasonable time, for freight specified, is a maritime contract, a breach of which entitles the shipper to recover damages in admiralty.

2. SAME—LIBEL—EXCEPTIONS—PARTIES.

Where a libel in admiralty was filed against a boat and barge for breach of a maritime contract, parties other than the intervening claimant were not entitled to file exceptions thereto.

¶ 1. Admiralty jurisdiction as to matter of contract, see notes to *The Richard Winslow*, 18 C. C. A. 347; *Boutin v. Rudd*, 27 C. C. A. 530.

See Admiralty, vol. 1, Cent. Dig. §§ 156, 164, 165.

Appeal from the District Court of the United States for the Northern District of Alabama.

John T. Ashcraft, for appellant.

Cooper & Foster, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This was a libel filed by the appellant against the steamboat Gladys and the barge attending said steamboat, known as "Barge R5," alleging that the master of the said steamboat Gladys loaded on board the said steamboat and the barge attending said steamboat, known as "R5," certain cotton seed, which was received in good order and condition, and which, as libelant charges, he agreed to deliver in good order and condition at a landing in Tennessee river, in the city of Florence, known as "Sweet-water Landing," unto libelant, it paying freight therefor; and libelant attached and made part of its libel a copy of certain telegrams and letters, as constituting the contract of carriage. The libel further charges that on or about the 2d day of March, 1899, the said steamer Gladys brought to Lock 7, in the Mussel Shoals Canal, the said cotton seed, and left the same loaded upon said barge, and exposed to the weather, and failed and refused to deliver the same unto libelant until on or about the 15th day of April, 1899, and that when so delivered on said 15th day of April the said cotton seed was not in the same order and condition as when received, but had been damaged by long exposure to the weather, the damage amounting to \$620. The libelant further averred that the steamboat and her barge were in the Tennessee river, within said district, and within the jurisdiction of the court, and it prayed for process in rem against the Gladys and the barge attending the steamboat Gladys, and their condemnation and sale to pay libelant's claim, with interest and costs, and for such further and other relief as, in law and justice, it should be entitled to receive.

The exhibits to the libel, made part of same, as constituting the contract of carriage, consist of letters and telegrams which passed between the libelant and Joseph Ringemann, Jr., manager, which letters are found on pages 3 to 5 of the record, inclusive. From these it appears that the libelant on February 2d stated that it had seed at Lamb's Ferry and a lot more near the ferry, which it could not get ready for this trip, and other to be brought from along the canal, and offered to contract with Mr. Ringemann, whom it addressed as manager, for the transportation of this seed at a named price per ton, which letter was answered by him by telegraph and post (both telegram and letter bearing date the 4th of February) accepting the libelant's proposition, and requesting libelant to have the seed sacked and ready along the line where they could get them for transportation, declaring that "we make this request because we expect to bring down other freight and want to take enough barges to carry out all we can get, * * * and as we have good prospects for more work between here and Florence we will agree to carry the rest of your seed also. In fact we are figuring to put a

regular boat in the trade between here and there. What do you think you can offer us in the way of business?" Next in order was a telegram from libelant on the 6th of February to Ringemann, notifying him of about 1,000 bags being at Lamb's Ferry, which they supposed to be all filled. And an answer by Ringemann on the same day notifying that the boat would start on a round trip next morning, and expressing a hope that the seed would be ready, "as we will not have as much lumber as we at first thought, in fact we may not get any and in that case less than one thousand sacks would fail to make a trip. We are very anxious to handle all the seed on this river for some one," etc. "* * *" and if you cannot send some one to buy it we will be compelled to bring them this way in order to keep them from going by some other boat." In a postscript to this letter, Mr. Ringemann, who signed it as manager, asked libelant to call upon one McClure and ask him "if we can handle his corn on this trip down." The next letter is from libelant, dated 23d February, expressing surprise at the seed not being brought down as agreed, and reply from Joseph Ringemann, Jr., manager, dated 27th February, declaring that by the time the letter arrives the boat (the Gladys) will be delivering libelant's seed, and suggesting other business in Elk river. According to the libel, it was under this that the master received the seed for transport.

Process having issued upon the libel, and the steamer and barge having been seized, and notice duly given, a claim was filed, verified by Joseph Ringemann, Jr., the manager, with whom the contract of carriage had been made, alleging that the "Alabama Towboat Company, E. S. Ringemann," was the owner of the steamer Gladys and barge R5, against which the libel was filed, and thereupon, bail having been given, the vessel was released. This occurred May 10, 1899; the libel having been filed and process issued 21st April, 1899. On June 2, 1899, the Alabama Towboat Company, as claimant, filed a brief answer, verified by Joseph Ringemann, Jr., as manager of the Alabama Towboat Company, in which answer a traverse was made of all the averments of the libel, and an alternative defense that, if the libel was true, the vessel was not liable, because "at the time of the commission of said acts the said steamer and barge were in the possession and control of the Rodman & Ringemann Company, who held the same under lease from claimant." To so much of this answer as sought thus to confess and avoid, exceptions were filed on 23d of March, 1900, but these were never acted upon by the court.

A great mass of testimony was taken by affidavit and deposition, which will be found extending from page 17 to page 88 of the record, and an agreement for a hearing was filed, but not acted on; and then, on the 25th of April, 1902, there were filed exceptions to the libel, not in the name of the claimant, but by counsel signing for "libelee," which exceptions were in the nature of demurrers, and assigned, among others, these grounds:

"(1) That the libel does not state a cause of action coming within the admiralty jurisdiction of the court. * * * (3) That it fails to set up a contract whereby libelee agreed to carry said cargo of seed from Lamb's Ferry

to Sweetwater Landing. (4) The contract which said libel purports to set out imposes no obligation on libelee to carry said cotton seed from Lamb's Ferry to Sweetwater Landing. (5) The contract which said libel purports to set out by the correspondence annexed thereto is a different contract from that declared on in said libel. (6) That there is nothing in the contract set out in the said libel which imposes upon the libelee the duty of delivering said cotton seed in good condition."

In this state of the record, the case was heard upon the exceptions to the libel, and it was agreed that a decision thereon might be rendered in vacation; and thereafter, on June 12, 1903, considerably more than a year later, the trial judge sustained the exceptions numbered 1, 3, 4, 5, and 6, and by further order decreed the dismissal of the libel. From this decree, summarily disposing of the case without a hearing on the merits, this appeal is taken.

The libel, while subject to criticism, shows a maritime contract within the admiralty jurisdiction of the court, a breach thereof, and a right to damages. The proceedings were irregular, in allowing to be filed and in hearing exceptions to the libel presented on the part of any other than an intervening claimant.

The transcript is unnecessarily padded by including 82 pages of alleged testimony not submitted to or considered by the court.

The decree dismissing the libel is reversed, and the case is remanded, with instructions to strike from the files the exceptions filed on the 25th day of April, 1902, in the name of "libelee," and thereafter proceed according to admiralty rules and procedure. Neither party to recover costs on this appeal.

(128 Fed. 918.)

CHAFFEE v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1904.) -

No. 1,648. .

1. CONTRACTOR'S BOND—DISCHARGE OF SURETY—AMOUNT RESERVED TILL COMPLETION OF BUILDING—UNTIMELY PAYMENT.

The fact that the owner pays a building contractor the per cent. of the contract price which, under the contract, should have been reserved till the completion of the building, does not release a surety on the contractor's bond, given to secure prompt performance of the work, and also the moneys due laborers and materialmen, from liability to the laborers or materialmen.

2. SAME—ACCEPTANCE OF ADVANCES BY MATERIALMAN.

A materialman does not discharge a surety on the contractor's bond, given to secure moneys due laborers and materialmen, by receiving acceptances from the contractor, and thereby extending the time of payment, where the acceptances have not been paid, and it does not appear that the contractor was solvent when they were made and insolvent when they were due, or that the extension resulted in loss or injury to the surety.

3. SAME—EXTENSION OF TIME.

An extension of time to a contractor by a materialman, who might in the first instance have fixed the time of the maturity of his claim without the knowledge or consent of a surety on the contractor's bond given to secure moneys due laborers and materialmen, does not release such surety.

¶ 2. Discharge of surety on building contract by change in obligation or duty of principal, see note to *United States v. Walsh*, 52 C. C. A. 427.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Martin Langdon, for appellant.

James McCabe (E. G. McGilton, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. This was a suit in equity brought by the United States Fidelity & Guaranty Company, the surety on a bond of the Omaha Building & Construction Company to the state of Nebraska, which was conditioned that the building company would comply with the terms and conditions of a contract between it and the state, and would well and truly pay for all material and labor entering into, or employed in the construction of, an addition to the insane hospital of the state, which the building company undertook to construct. The purpose of this suit was to enjoin the appellant, Clarence L. Chaffee, among others, who had furnished materials to the building company which had been used in the erection of the structure, from bringing an action at law upon the bond, and to compel its cancellation and surrender. The fidelity company obtained a favorable decree in the court below, which its counsel seek to sustain in this court upon two grounds.

They say that the fidelity company was released because the state paid to the building company, before it was due, the 15 per cent. of the contract price which by the terms of the agreement between them was reserved until the completion of the work. But minor changes in the contract or in its execution made by the principal parties to it without the knowledge of the laborers or materialmen who furnished the work and supplies to construct the building do not release the surety from his liability to the laborers or materialmen under a bond of the nature of that in suit, which has two functions—first, to secure to the owner of the building a prompt performance of the contract; and, second, to secure to the laborers and the materialmen the payment for the work and materials which they bestow upon the building. *United States, to Use of Anniston Pipe & Foundry Co., v. National Surety Co.*, 92 Fed. 549, 552, 34 C. C. A. 526, 529.

In the second place, they say that the fidelity company was released from its obligation to pay Chaffee because after his claim became due he received acceptances for it from the building company, and thereby extended the time of its payment. But the acceptances were not paid; there is no pleading and no evidence that the building company was solvent when they were made, and insolvent when they were due, or that the extension of the time of payment which they effected resulted in any loss or injury to the fidelity company; and the mere extension of the time of payment of his claim by a laborer or by a materialman, who could in the first instance have fixed the time of its maturity without the knowledge or consent of the surety, does not release the latter from liability to pay it under a bond of the character of that here in suit. *United States Fidelity &*

Guaranty Co. v. United States, etc., 24 Sup. Ct. 142, 48 L. Ed. 242, filed December 7, 1903.

The decree below is reversed upon the authority of the two cases cited, and the case is remanded to the court below, with instructions to enter a decree against the fidelity company for the amount owing upon the claim of Chaffee, with interest.

(128 Fed. 920.)

THE BERGEN. THE ROBERT HADDON. THE RANZA.

(Circuit Court of Appeals, Second Circuit. January 6, 1904.)

Nos. 45, 46.

1. COLLISION—FERRYBOAT AND STEAMSHIP IN TOW—INSUFFICIENT LOOKOUT.

A finding by the District Court affirmed that a ferryboat crossing North river in the evening was solely in fault for a collision with a steamship coming up the river in tow and disabled, on the ground that owing to the insufficiency of the ferryboat's lookout she failed to see the lights of the steamship until shortly before collision, and to keep out of the way, as she was bound to do after receiving an alarm signal from the tug.

2. SAME—DAMAGES.

An award of damages for collision on the report of a commissioner considered and approved.

Appeal from the District Court of the United States for the Southern District of New York.

These are appeals from final decrees of the District Court, Southern District of New York, holding the ferryboat Bergen solely responsible for a collision between herself and the S. S. Ranza. The latter was coming up the North river in tow of the tug Robert Haddon, on a hawser, with two additional tugs assisting her, made fast to the port and starboard sides of the steamer. The Bergen was bound from her slip in Hoboken to slip at Barclay street, New York. The decision of the District Court is reported in 108 Fed. 553.

Le Roy S. Gove, for appellant.

J. Parker Kirlin, for appellee the Ranza.

Chas. C. Burlingham, for appellee the Robert Haddon.

Before LACOMBE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

PER CURIAM. We entirely concur with Judge Brown's opinion as to the maneuvers of the vessels, the rules of law applicable, and the responsibility for the collision. In the opinion as printed in the record it is stated that, up to the time the first signal was sounded, "the Haddon had been showing her green light and the Bergen her red light only." The context shows that this is an error of transcription or of printing—the colors should be reversed. This correction being made, it is unnecessary to discuss the navigation further. The Bergen was clearly in fault for the reasons stated by the District Judge, and his conclusion that no fault having any material influence on the result was committed by either of the other vessels is sound.

The appellant objects to some of the items of damage allowed by the commissioner. Five days' demurrage was allowed for detention of the vessel. It appears that, besides the repairs necessitated by the collision, other repairs were made to tail shaft and stern tube, and the

vessel was put on dry dock and there painted. She was towed to the dry dock, and lay in the slip for several days, surrounded with ice; thereafter she was docked and painted. The commissioner has carefully discussed her movements, and discriminated between detention for the repairs of collision injury and detention for painting, etc. He says:

"No cause appears for the delay in breaking up and freeing the ship from the ice, and docking and painting her, as soon as she arrived at the dry dock at 10:15 a. m. of February 12th, nor for the delay in so doing until 9:30 a. m. of February 17th, except the work of repairing the collision injuries, which did not require docking."

He found evidence of the doing of such work in successive entries in the log: "Laborers working on port bow." On the 14th, 15th, and 16th the log states that the work on port bow continued through both day and night. Evidently the greatest dispatch was used, and the time of detention made as short as possible.

Appellant criticises the evidence as not sufficient to show that the "work on the port bow had any connection with the collision damages." In view of the fact that the Bergen struck the Ranza on the port bow with such force that the bow was stove in, and of the concession by appellant that \$2,950 was the fair and reasonable value of the work and materials required to repair such damage, this criticism is without merit. The log does not state that any work was done on board on the first of the five days, but the ship lay in the slip to be repaired, and presumably shop preparation of material was required before the work on board could begin.

Since the fair cost of repairs was concededly nearly \$3,000, the two items of \$100 and of \$150, respectively allowed for surveyor's fees, are reasonable; they include, besides survey and recommendations, the making specifications and contract for repairs, and superintending and passing upon the work by both surveyors.

The commissioner allowed \$109.25 for cables to and from Liverpool. Appellant contends that this amount includes matters other than those directly concerned with the collision, such as notification of loss of propeller at sea, and arrangements for charter for next voyage. The respondent contends that the commissioner excluded such messages, and that the items which make up the \$109.25 relate solely to the collision and its sequela. The record sets forth all the messages in full (the price is 25 cents a word), and it is, of course, practicable to make a list of them—to draw off the words which deal with the collision, and make a calculation of their cost. It is not, however, to be expected that this court is to give its time to such clerical work over items trivial in amount. Even if the \$109.25 includes all the messages sent and received, the appellant concedes that it covers many dispatches concerned solely with the collision. If he wished to have eliminated from it certain items included by the commissioner, he should have prepared some tabulation which would show precisely what items make up the \$109.25, so that this court could conveniently determine whether any correction is required, and, if so, to what extent.

The decree is affirmed, with interest and costs.

(128 Fed. 928.)

L. E. WATERMAN CO. v. McCUTCHEON.**SAME v. FORSYTHE et al.**

(Circuit Court of Appeals, Second Circuit. January 6, 1904.)

Nos. 6, 32.

1. PATENTS—INFRINGEMENT—FOUNTAIN PENS.

The Waterman patent, No. 293,545, for a fountain pen, having an ink duct provided with one or more longitudinal fissures formed in its walls for facilitating the passage of the ink through said duct, is not infringed by pens having a reed or strip within the duct to produce capillary action, in connection with the walls of the duct, it being shown that such pens were in use prior to the invention of the patent.

Appeals from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 121 Fed. 107.

These are appeals from decrees of the Circuit Court, Southern District of New York, dismissing bills of complaint for alleged infringements of United States patent No. 293,545, February 12, 1884, to L. E. Waterman for a fountain pen. The court construed the claims of the patent closely, and held that the devices complained of did not infringe.

Walter S. Logan, for appellant.

O. R. Mitchell, for respondent McCutcheon.

W. B. Whitney, for respondent Forsythe.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. It is unnecessary to write an opinion, since we concur substantially with the reasoning and conclusions of the judge who heard the cause in the Circuit Court. We are inclined, however, to rest the conclusion that the patented device must be construed so closely as not to include defendants' pens upon the pens, R, R, etc., whose prior use was abundantly proved, rather than upon the patents under which those pens were made. The literature of the art shows ink ducts in which are inserted separable reeds or strips in such manner that between them and the walls of the duct there are longitudinal spaces small enough to permit of the capillary action which the complainant's "fissures" provided for. In the prior patents, however, these reeds or strips are prolonged for the entire length of the ink duct, and the tip brought into contact with the pen. Each reed or strip thus performs two functions—it co-operates with the side walls of the duct to produce capillary action, and, being vibrated in the act of writing, it conveys an agitating motion to the ink. In the prior pens, R, R, etc., however, the tip contacting with the pen is eliminated, and the vibrator or agitator method of assisting the ink duct is abandoned, and the only function left for the reed or strip is the co-operation to produce capillary action.

In view of the proof that such pens were in actual use before Waterman's improvement was made, we concur in the opinion, and affirm the decrees below, with costs.

(129 Fed. 347.)

DENVER & R. G. R. CO. v. ARRIGHI.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1904.)

1. MASTER AND SERVANT—RAILROADS—INJURIES TO SERVANT—COUPLING CARS—STATUTES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Act March 2, 1893, c. 196, § 8, 27 Stat. 532 [3 U. S. Comp. St. 1901, p. 3176], providing that any employé of any interstate carrier who may be injured by any car used in interstate traffic by reason of the same not having been equipped with an automatic coupler device coupling by impact shall not be deemed to have assumed the risk thereby occasioned, though continuing in the employment of the carrier after the unlawful use of the car had been brought to his knowledge, did not relieve an employé injured by a car not so equipped from liability for his own contributory negligence.

2. SAME—EVIDENCE.

Plaintiff, a skilled switchman, was injured while attempting to couple two cars equipped with link and pin couplings, with which he was perfectly familiar. The engineer was under his direction at the time, and backed the train so slowly that it barely moved. Plaintiff took hold of the link of the approaching car with his left hand to guide it, and, having done so, left his hand between the drawheads until his fingers were crushed by the impact. *Held*, that under the particular facts appearing in the case the plaintiff was guilty of contributory negligence as a matter of law.

In Error to the Circuit Court of the United States for the District of Colorado.

Arrighi, the plaintiff below, was a switchman in the service of the railroad company in its yards at Salida, Colo. The railroad company was a common carrier engaged in interstate commerce as well as in commerce within the state. On the evening of November 19, 1901, Arrighi was injured while endeavoring to effect a coupling of two narrow-gauge freight cars, one of which was at the time employed in moving interstate traffic. Neither car was equipped with couplers coupling automatically by impact. The drawbars of each were equipped with old-style link and pin couplings. It therefore became necessary for Arrighi to go between the ends of the cars in the performance of his duty. In making the coupling his left hand was crushed between the drawheads, resulting in the loss of the first three fingers thereof and the corresponding metacarpal bones. He brought suit against the railroad company, and at the trial rested his right to recover solely upon the failure of the defendant to comply with the provisions of the act of Congress of March 2, 1893, c. 196 (27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring the equipment of cars used in moving interstate traffic with couplers operating automatically. He recovered a judgment for \$10,000, and the defendant prosecuted a writ of error from this court.

Wm. W. Field (Wolcott, Vaile & Waterman and E. N. Clark, on the brief), for plaintiff in error.

Harvey Riddell (William L. Dayton, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The trial court denied a request of the defendant that the jury be instructed to return a verdict in its favor for the reason that the

¶1. Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

plaintiff was guilty of negligence contributing to his injury. The action of the court in that respect is assigned as error. Prior to the time when the act of Congress became fully operative, the employes of a railroad company subject to its provisions, engaged in coupling cars used in moving interstate traffic, but not equipped with automatic couplers, assumed the ordinary risks and hazards of that employment, and the company was not liable to them for injuries resulting therefrom. The common-law doctrine of the assumption of risk was then applicable. But a new rule is prescribed by the act. It specifically provides that the employes shall no longer rest under the burden of that assumption in respect of any car used contrary to its provisions. While this is true, the railroad company is not thereby deprived of the defense of contributory negligence. With an exception, unnecessary to be noted here, the risks and dangers of an employment which at common law are assumed by the employe are not those which arise from the negligence of either party. And when the burden of those assumed risks and dangers were lifted from the employe by statutory enactment, and cast upon the railroad company, there was not transferred therewith a responsibility for the negligence of the employe himself. The rationale of the doctrine of assumption of risk is not that which supports the rule of contributory negligence. They operate differently, and are dependent upon widely different principles. *Railroad Company v. McDade*, 24 Sup. Ct. 24, 48 L. Ed. 96; *St. Louis Cordage Company v. Miller* (C. C. A.) 126 Fed. 495.¹ It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in a hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defense of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements.

The undisputed facts in this case are as follows: The plaintiff was a skillful workman in his calling, having had about 11 years' experience in railroading. He was thoroughly acquainted with the old-style link and pin couplings and the method of operating them. He knew that the cars which he sought to couple were so equipped. There was no defect in the couplings which contributed to the accident. The engine which was moving the car up to make the coupling was being directed by him, and they came up so slowly as to be barely moving. Not a single fact, circumstance, or condition appeared in connection with the cars, their surroundings, equipment, or operation which was exceptional, or which seemed in any way to contribute to the accident. The plaintiff adopted the most dangerous method of performing his duty. He took hold of the link of the approaching car with his left hand to guide and direct it, and, having done so, he simply left his hand between the drawheads until his fingers were crushed by the impact. His attention was not momentarily distracted; the moving car did not approach more rapidly than he calculated; he did not stumble or lose his balance, nor was he unable to see clearly; he was not unfamiliar in any de-

¹ 61 C. C. A. 477, 63 L. R. A. 551.

gree with the character of the appliances about which he was engaged; and it does not even appear that he endeavored to remove his hand. In fact, if the plaintiff had declared that he made no effort to remove his hand from between the drawheads, he would not have added much to the force of the facts and circumstances shown by the record. The plaintiff himself was the principal witness in his own behalf, and the conditions which we have recited were shown almost wholly by his own testimony. The conclusion is irresistible that the plaintiff's injury was caused by his own want of proper care, and was not the result of the ordinary and usual risks and dangers of his employment. Bearing in mind the limitations upon the power of the trial court in respect of the defense of contributory negligence, we are nevertheless of the opinion that upon the evidence then before it the instruction requested should have been given.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

(129 Fed. 1.)

PEYTON et al. v. DESMOND.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1904.)

No. 1,878.

1. VENUE—ACTION TO RECOVER FOR TRESPASS TO REAL ESTATE—LOCAL OR TRANSITORY, ACCORDING TO LAW OF STATE WHERE BROUGHT.

Whether an action to recover pecuniary damages for trespass to real estate is real and local, or is personal and transitory, is essentially a matter of state policy or local law, and must be determined by the view taken of the nature of the action in the state in which it is brought.

2. SAME—MINNESOTA.

In Minnesota an action to recover pecuniary damages for trespass to real estate in another state is viewed, not as relating to the real estate, but only as affording a personal remedy, and transitory.

3. SAME—PLEADING—ACTION TO RECOVER FOR CUTTING AND REMOVAL OF TIMBER—WHEN TRANSITORY.

Where the facts stated and the relief demanded show that the gravamen of the action is the conversion of lumber manufactured out of trees wrongfully cut and removed from plaintiff's land by defendant, and that the purpose of the action is to recover the value of the lumber, and not damages for any depreciation in the value of the land, the action is transitory, although the trespass to the land is stated as illustrating the character of the conversion, and as bearing upon plaintiff's right to recover the value of the manufactured lumber.

4. SAME.

The giving of an instruction in such an action, at the request of the defendant, that the measure of damages recoverable was the value of the logs as they stood in the trees, could not change the nature of the action, whether or not it stated the correct measure of damages; nor can it be invoked by defendant to defeat the jurisdiction of the court.

5. PUBLIC LANDS—PROCEEDINGS TO ACQUIRE TITLE—JURISDICTION OF LAND DEPARTMENT.

The jurisdiction of the Land Department over public lands continues so long as the legal title remains in the United States, and the decisions and rulings of that department in proceedings to acquire title to such lands, prior to the act which passes the legal title from the government, are interlocutory, and are as much open to review or reversal by the

Land Department, while the legal title remains in the United States, as are the interlocutory decrees of a court open to review upon the final hearing.

6. SAME—FINAL ACT OF LAND DEPARTMENT—TERMINATION OF JURISDICTION.

The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and the expression and entry of the final judgment, of the officers of the Land Department, and marks the termination of the jurisdiction of these officers.

7. SAME—NOTICE OF PROCEEDINGS IN LAND DEPARTMENT.

The power of the Land Department to review its prior rulings, and to cancel existing entries, while the legal title remains in the United States, is not unlimited or arbitrary, and can be exercised only after notice to parties in interest and due opportunity for a full hearing.

8. SAME—CONVEYANCE BY ENTRYMAN PRIOR TO PATENT—RIGHTS ACQUIRED.

One who purchases from an entryman, on the faith of a final receipt or patent certificate, before the issuance of a patent, takes only the equity of his vendor, subject to the authority of the Land Department to cancel the entry, while the legal title remains in the United States, if it is found that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it.

9. SAME—DECISION OF LAND DEPARTMENT AS TO MATTERS OF FACT CONCLUSIVE IN COLLATERAL PROCEEDING.

The Land Department being a special tribunal to which Congress has confided the administration of the public land laws, the final judgment of that department as to matters of fact properly determinable by it is conclusive, when brought to notice in a collateral proceeding.

10. SAME—EFFECT OF STATE STATUTE.

A state statute, purporting to regulate the effect of final receipts issued by the Land Department of the United States, cannot restrict the authority of the officers of that department in the disposition of the public lands, or withhold from the grantees of the United States any of the incidents of the transfer of the government title.

11. SAME—APPLICATION OF DOCTRINE OF RELATION.

The doctrine of relation is applicable to public land transactions, and, where necessary to give effect to the intent of the statute or to cut off intervening claimants, the patent is deemed to relate back to the initiatory act.

12. SAME—HOMESTEAD PATENTEE—RIGHT TO RECOVER FOR TIMBER CUT AFTER INITIATION OF CLAIM AND BEFORE ISSUANCE OF PATENT.

A patent issued under the homestead laws relates back to the initiation of the claim, and gives the patentee the right to recover the value of timber wrongfully cut and removed from the land after the initiation of his claim, as established by the patent proceedings, and prior to the issuance of the patent.

In Error to the Circuit Court of the United States for the District of Minnesota.

This action was brought in the Circuit Court of the United States for the District of Minnesota, Fifth Division, December 20, 1898, by George E. Desmond, a citizen of Wisconsin, against Hamilton M. Peyton and Levi A. Barber, citizens of Minnesota, and residents of the Fifth Division of the Minnesota District. The complaint alleged that the plaintiff made homestead settlement in 1890 upon a stated quarter section of public land in Wisconsin, containing merchantable pine timber aggregating 3,600,000 feet, board measure; that continuously thereafter he resided upon and occupied the land, and obtained a United States patent therefor May 16, 1898, by full and regular compliance with the homestead law; that in the winter of 1893 and 1894

† 11. See Public Lands, vol. 41, Cent. Dig. § 315.

while he was in possession of the land under his homestead claim, the defendants "wrongfully and unlawfully and forcibly entered upon" the land, and cut therefrom all the pine timber; that they thereafter carried off and removed all of this timber, and sawed the same into lumber, and thereafter, and before the issuance of the patent to plaintiff, sold and disposed of the lumber; that the acts of the defendants were done and performed with full knowledge of the rights of the plaintiff to the timber, and against his protest; that the value of the timber prior to the cutting of the trees was \$4 per thousand feet, board measure, and after being sawed into lumber was \$12 per thousand feet, board measure. Judgment was prayed for \$43,200, the value of the lumber, with interest. The case was soon brought to issue, but a trial was not had until October, 1902, when a verdict was returned for plaintiff in the sum of \$9,425, with interest, for which judgment was given against defendants. No objection was made to the jurisdiction until immediately preceding the trial, when defendants moved that the action be dismissed for the reason, as then asserted by them, that it was one for trespass to realty in Wisconsin, and was therefore local, and not within the jurisdiction of the court below. The action upon this motion was as follows:

"Mr. O'Brien [for plaintiff]: * * * This action is brought to recover the value of the timber cut and carried away from the land. It is not, under the statutes of Minnesota, nor under the practice of this state, an action of trespass. It is an action in trover, pure and simple; and the measure of damages here is the value of the timber when cut from the land, and not the injury to the land. The resulting injury to the land in this case is not alleged as a matter of damage, nor would the court permit testimony to be introduced to show it. It is really an action of trover, because the damages sought to be recovered is the value of the property when severed from the land. * * *

"Mr. Hayden [for defendants]: I will concede that they could have made a transitory action out of this matter, by using the same facts, if they had seen fit to bring their action in trover instead of in trespass.

"The Court: I think I understand your position fully. It is not a matter of words, but it is a matter of the substantive facts, constituting the plaintiff's right to recover. He seeks to recover in this case—the complaint leaves no doubt that he so seeks to recover—the value of the timber at the latest stage when it can be traced into your hands, to wit, the value of the lumber. He does not seek to recover damages for the depleted value of the land, which is the essential feature of a suit in trespass. The motion is denied."

Other rulings at the trial were to the effect that the title obtained by plaintiff, by his compliance with the homestead law, and by the issuance to him of the patent for the land, related back so as to enable him to maintain this action.

The evidence showed that plaintiff and one Benjamin F. Judd settled upon the land prior to the passage of the land grant forfeiture act of September 29, 1890, c. 1040, § 2, 26 Stat. 496 [U. S. Comp. St. 1901, p. 1599], under which the land was restored to the public domain; that each claimed to have settled with a view to obtaining title under the homestead laws of the United States: that each claimed to be the prior settler, and each presented in due time at the local land office an application to make homestead entry, but the application of Judd, being presented first, was allowed by the local land officers, and that of the plaintiff rejected; that a contest, based upon plaintiff's claim of prior settlement, was then commenced in the local land office by plaintiff against Judd's entry, the proceedings in which resulted in a decision by the Secretary of the Interior against the plaintiff, January 7, 1893; that Judd on July 17, 1893, commuted his homestead entry, and obtained a patent certificate, but no patent was ever issued to him; that plaintiff on October 9, 1893, or possibly when Judd submitted final proof upon his entry, instituted in the local land office further contest proceedings against Judd's entry, which resulted in a decision by the Secretary of the Interior May 23, 1896 (Desmond v. Judd, 22 Land Dec. Dep. Int. 619), declaring that Judd had not in good faith maintained his residence on the land as required by the homestead law, and directing the cancellation of his entry; that, following this decision, plaintiff made final homestead entry of the land, under the statute requiring five years' residence, and under that entry obtained a United States patent May 16, 1898;

that in the meantime, on October 11, 1893, the lands were conveyed by Judd to defendants; that defendants had knowledge of, and participated in, the contest proceedings in the Land Department which resulted in the cancellation of Judd's entry; and that the cutting and conversion of the timber by defendants occurred in the winter of 1893 and 1894, while the contest proceedings last named were pending.

Arthur H. Crassweller (Frank Crassweller, on the brief), for plaintiffs in error.

C. D. O'Brien (Thos. D. O'Brien and P. H. Seymour, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

By the common law of England, an action for the recovery of damages for injury to land is local, and can be brought only where the land is situated. This is the law in most of the states of the Union. 1 Chitty, Pl. 281; Shipman, Com. L. Pl. (2d Ed.) 201, 383; Cooley on Torts, 471; Livingston v. Jefferson, 15 Fed. Cas. 660, No. 8,411; McKenna v. Fisk, 1 How. 241, 11 L. Ed. 117; Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913. The operation of this common-law rule has been much restricted by legislation in England (British South Africa Co. v. Companhia de Mocambique [1893] App. Cas. 602) and in some of the states (15 Fed. Cas. 665, note; Genin v. Grier, 10 Ohio, 209, 214). There are other states in which the rule never prevailed. Holmes v. Barclay, 4 La. Ann. 63. The matter is essentially one of state policy or local law. As was said by Mr. Justice Gray in Huntington v. Attrill, 146 U. S. 657, 669, 13 Sup. Ct. 224, 36 L. Ed. 1123:

"Whether actions to recover pecuniary damages for trespasses to real estate * * * are purely local, or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only as affording a personal remedy. * * * And whether an action for trespass to land in one state can be brought in another state depends on the view which the latter state takes of the nature of the action."

In Minnesota an action for pecuniary damages for trespass to real estate in another state is viewed, not as relating to the real estate, but only as affording a personal remedy. It is there deemed to be transitory in nature, and not local. In Little v. Chicago, etc., Railway Co., 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421, the Supreme Court of that state, in sustaining the jurisdiction of the courts of the state over an action brought to recover damages for injuries to real estate situated in Wisconsin, said:

"The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real."

By the existing judiciary act (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) it is declared:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and

* * * in which there shall be a controversy between citizens of different states, * * * but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. * * *

This action presents a controversy between citizens of different states, and was brought in the district and division of the residence of the defendants. It is of a civil nature, is a common-law action, and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. Being also an action which is cognizable in the courts of the state, as before shown, it is equally within the concurrent cognizance of the Circuit Court of the United States, within that state. It was said by Mr. Justice Field in *Gaines v. Fuentes*, 92 U. S. 10, 18, 20, 23 L. Ed. 524, in referring to the jurisdiction of the federal courts of suits at common law or in equity in which there is a controversy between citizens of different states:

"The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different states to which the judicial power of the United States may be extended, and Congress may therefore lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary. * * * There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if, by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other states."

Even if the action be regarded as one for the recovery of damages for injury to land, we think it was cognizable in the circuit court.

But we believe this is an action for the recovery of damages for the conversion of personal property—one more in the nature of trespass *de bonis asportatis* or trover than of trespass *quare clausum fregit*—and that it is transitory, and not local, under the common-law distinction. By the laws of Minnesota (sections 5131, 5228–5231, Gen. St. 1894), the forms of actions existing at common law are abolished, and the first pleading or complaint by the plaintiff is required to contain a plain and concise statement of the facts constituting his cause of action, and a demand for the relief to which he supposes himself entitled. The facts stated and the relief demanded, rather than the form of statement, determine the nature of the action. The facts here stated and the relief demanded show that the gravamen of the action is the conversion of the lumber manufactured out of the trees, and that the purpose of the action is to recover the value of the lumber. There is no direct statement of a depreciation in the value of the land by reason of the trespass, and there is no attempt to dwell upon the injury to the land by stating that the remaining trees or undergrowth were injured, that roads were constructed through the land, or that the soil was disturbed in hauling away the pine timber, or was incumbered with the limbs and tops of the trees removed. This, and the fullness and particularity with which the complaint states the manufacture of the severed trees into lumber and their conversion, shows that the conversion is deemed the principal thing, and that the trespass is stated only as illustrating

the character of the conversion, and as bearing upon plaintiff's right to recover the value of the manufactured lumber, which, as alleged, is identical with the amount for which judgment is demanded. The fact that the defendants did not question the nature of the action until at the trial, almost four years after the action was commenced, and that then the plaintiff promptly and decisively declared it to be one to recover the value of the timber when severed from the land, and not damages for any resulting injury to the land, requires that any doubt or uncertainty as to the nature of the action arising from the fullness of statement in the complaint be resolved in favor of the jurisdiction; the case being one where, upon the facts stated, the plaintiff, in commencing his action, could have made the trespass to the land the gravamen thereof, or, waiving that, could have relied upon the conversion. When the timber was severed from the land it became personal property, but the title to it was not changed. It remained the property of the owner of the land, as before the severance, and he could have followed and reclaimed his property into whatever jurisdiction it might have been taken, or he could have maintained an action in the nature of trespass *de bonis asportatis* for damages for its unlawful asportation, or he could have maintained an action in the nature of trover for damages for its conversion. *United States v. Cook*, 19 Wall. 501, 22 L. Ed. 210; *Schulenbergh v. Harriman*, 21 Wall. 44, 64, 22 L. Ed. 551; *United States v. Steenerson*, 1 C. C. A. 552, 50 Fed. 504; *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550; *Nelson v. Burt*, 15 Mass. 204; *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Farrant v. Thompson*, 5 B. & Ald. 826; *Richardson v. York*, 14 Me. 216; *Moody v. Whitney*, 34 Me. 563; *Whidden v. Seelye*, 40 Me. 247, 255, 63 Am. Dec. 661; *Bulkley v. Dolbeare*, 7 Conn. 232; *Wadleigh v. Janvrin*, 41 N. H. 503, 520, 77 Am. Dec. 780; *Greeley v. Stillson*, 27 Mich. 153; *Tyson v. McGuineas*, 25 Wis. 656, 659; *Mooers v. Wait*, 3 Wend. 104, 20 Am. Dec. 667; *Wright v. Guier*, 9 Watts, 172, 36 Am. Dec. 108; *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617. The rule for determining the character of the action is well stated in 2 *Waterman on Trespass*, § 1102:

"Although, as standing trees are part of the inheritance, and the severing them from it is deemed an injury to the freehold, for which trespass *quare clausum fregit* is the appropriate remedy, yet the party may waive that ground of recovery, and claim the value of timber only thus severed and carried away. In the one case the entering and breaking of the close is the gist of the action; in the other, the taking and carrying away of the property. In the latter case the action is transitory, and not local."

This case is unlike *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913, relied upon by the plaintiffs in error, because there the allegations of the petition made a continuing trespass upon the land, covering a period of more than 10 years, the principal thing, and the conversion of the timber only incidental. The case of *Stone v. United States*, 167 U. S. 178, 182, 17 Sup. Ct. 778, 42 L. Ed. 127, is more in point. There the petition stated the ownership of the lands by the plaintiff, and that the defendant "unlawfully, wrongfully, and willfully cut from the said lands 77,441 trees." It then stated with much particularity that the defendant thereafter manufactured the trees into lumber and railroad ties and converted these to his own use,

and, after stating the value of the trees when standing upon the land, and the value of the manufactured products at the time of the conversion, demanded judgment for the latter. After distinguishing the case of *Ellenwood v. Marietta Chair Co.*, Mr. Justice Harlan, speaking for the court, said:

"In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands. Although the government's [defendant's] denial of the [government's] ownership of the land made it necessary for it to prove its ownership, the action, in its essential features, related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process."

That case is so nearly identical with the present one that the decision of the Supreme Court therein controls the determination of the question now under consideration, and requires that this action be held to be transitory and within the jurisdiction of the Circuit Court.

It is said that "the court charged the jury that the measure of damages was not the value of the logs taken, but their value as it appeared in the tree," and because of this we are asked to declare this action local. This instruction was given at the request of the defendants. If it properly states the rule for measuring the damages to be awarded in an action for the conversion of personal property under the circumstances shown at the trial (*Wooden Ware Co. v. United States*, 105 U. S. 432, 27 L. Ed. 230; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Gentry v. United States*, 41 C. C. A. 185, 101 Fed. 51; *United States v. Homestake Mining Co.*, 54 C. C. A. 303, 117 Fed. 481), it is in harmony with the court's jurisdiction of the case; and, if it states the rule more favorable to the defendants than they were entitled to ask, its only effect has been to diminish the damages which otherwise would have been awarded to the plaintiff—a matter which cannot be invoked by the defendants to defeat the jurisdiction or otherwise. It was correctly ruled at the beginning of the trial, and again at its close, that the action was one for the conversion of personal property and not for trespass to land.

Does plaintiff's title under the patent issued May 16, 1898, upon his homestead entry, relate back to a time anterior to the cutting of the timber by the defendants in the winter of 1893 and 1894, and entitle him to maintain this action? The solution of this question depends upon the effect to be given in this action to the proceedings in the Land Department of the United States upon the adverse claims of the plaintiff and Judd. The land covered by the patent issued to the plaintiff, while formerly within a land grant made in aid of the construction of a railroad, was restored to the public domain under the act of September 29, 1890, c. 1040, § 2, 26 Stat. 496 [U. S. Comp. St. 1901, p. 1599], with a direction that actual settlers in good faith at the date of the act should have a preference right of entry, and should "be regarded as such actual settlers from the date of actual settlement or occupation." Proceedings

to acquire the title to this land, instituted and conducted in the Land Department, with due notice to the parties in interest, and with opportunity for full hearing, resulted in the issuance of a patent conveying the government's title to the plaintiff. During the pendency of these proceedings, while the legal title was yet in the United States, and with notice of plaintiff's claim, the defendants purchased the land from Judd, cut and removed therefrom the timber, and sold the lumber into which it was sawed by them. In doing this, the defendants relied upon a ruling of the land officers which declared Judd's claim to be the superior one, and under which he had submitted proof of compliance with the homestead law, and had obtained a certificate declaring that he was entitled to a patent. But this ruling and the issuance of this certificate were not in themselves final acts, and, no patent being issued thereon, they never became final. The rulings and acts of the officers of the Land Department of the United States, made and done in the course of proceedings to obtain the title to public land before the issuance of a patent, are interlocutory; and, "until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing." *New Orleans v. Paine*, 147 U. S. 261, 266, 13 Sup. Ct. 303, 37 L. Ed. 162. The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and is the expression and entry of the final judgment of the officers of the Land Department; and this is the act that marks the termination of the jurisdiction of these officers and the beginning of the jurisdiction of the courts. *Moore v. Robbins*, 96 U. S. 530, 533, 24 L. Ed. 848; *United States v. Schurz*, 102 U. S. 378, 396, 401, 402, 26 L. Ed. 167; *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 592, 18 Sup. Ct. 208, 42 L. Ed. 591; *Brown v. Hitchcock*, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; *Bockfinger v. Foster*, 190 U. S. 116, 23 Sup. Ct. 836, 47 L. Ed. 975. "The true rule, drawn from an examination of all of the authorities, is that the jurisdiction of the Land Department ceases where the jurisdiction of the courts commences, viz., when the legal title passes, and that there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law, and protect both public and private rights" involved in proceedings for the acquisition of its title. *Parcher v. Gillen*, 26 Land Dec. 34, 42. So long as the legal title remains in the United States, the land laws are in process of administration. *Michigan Land & Lumber Co. v. Rust*, supra; *Beley v. Naphtaly*, 169 U. S. 353, 364, 18 Sup. Ct. 354, 42 L. Ed. 775; *Brown v. Hitchcock*, supra. And the extent, character, and validity of rights claimed under those laws, and of entries made thereunder, are subject to inquiry, examination, and determination in the Land Department. See authorities supra, and *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; *Hawley v. Diller*, 178 U. S. 476, 488, 490, 20 Sup. Ct. 986, 44 L. Ed. 1157; *Cosmos Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 309, 23 Sup. Ct. 692, 47 L. Ed. 1064. That this is necessarily so is shown in the following statement of Mr. Secretary Lamar (5 Land Dec. Dep. Int. 494), which received the approval

of the Supreme Court in *Knight v. United States Land Association*, 142 U. S. 161, 178, 12 Sup. Ct. 258, 35 L. Ed. 974:

"For example, if, when a patent is about to issue, the secretary should discover a fatal defect in the proceedings, or that, by reason of some newly ascertained fact, the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul."

But the power of the Land Department to review its prior rulings and to cancel existing entries is not unlimited or arbitrary (*Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482), and can be exercised only after notice to parties in interest and due opportunity for a full hearing (*Brown v. Hitchcock*, 173 U. S. 478, 19 Sup. Ct. 485, 43 L. Ed. 772; *Guaranty Savings Bank v. Bladow*, 176 U. S. 448, 453, 20 Sup. Ct. 425, 44 L. Ed. 540; *Hawley v. Diller*, 178 U. S. 489, 20 Sup. Ct. 986, 44 L. Ed. 1157; *Thayer v. Spratt*, 189 U. S. 346, 351, 23 Sup. Ct. 576, 47 L. Ed. 845). One who purchases of an entryman before the issuance of a patent obtains no greater right or estate than is possessed by the entryman, and acquires at the most a right or equitable estate, which is subject to examination in the Land Department while the title remains in the government. In the absence of a statute providing otherwise, he is chargeable with knowledge of the state of the title which he buys, holds it subject to any equities which could be asserted against it in the hands of the vendor, and takes the risk of losing it if it is subsequently shown that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it. *Hawley v. Diller*, 178 U. S. 485-488, 20 Sup. Ct. 986, 44 L. Ed. 1157; *Guaranty Savings Bank v. Bladow*, 176 U. S. 454, 20 Sup. Ct. 425, 44 L. Ed. 540; *Thayer v. Spratt*, 189 U. S. 352, 23 Sup. Ct. 576, 47 L. Ed. 845. The Land Department being a special tribunal to which Congress has confided the administration and execution of the laws for the disposition of the public lands, the final judgment of the officers of that department as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding, such as this is, and is unassailable, except by a direct proceeding for its correction or annulment. *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 340, 23 L. Ed. 424; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Moss v. Dowman*, 176 U. S. 413, 20 Sup. Ct. 429, 44 L. Ed. 526; *Calhoun, etc., Co. v. Ajax, etc., Co.*, 182 U. S. 499, 510, 21 Sup. Ct. 885, 45 L. Ed. 1200; *De Cambra v. Rogers*, 189 U. S. 119, 23 Sup. Ct. 519, 47 L. Ed. 734; *Gertgens v. O'Connor*, 191 U. S. 237, 24 Sup. Ct. 95, 48 L. Ed. 163; *James v. Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 597; *Uinta Tunnel, etc., Co. v. Creede, etc., Co.*, 57 C. C. A. 200, 119 Fed. 164. As was said by Mr. Justice Field in *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly

signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

By the application of these established rules to the facts of this case, it is seen that the proceedings in the Land Department, which terminated with the issuance of the patent to the plaintiff, were within the jurisdiction of that department, and by them it is conclusively determined, so far as this action is concerned, that the plaintiff, by full compliance with the requirements of the homestead law, entitled himself to the patent; that he lawfully settled upon the land, and lawfully maintained his residence thereon for a continuous period of at least five years before the patent was issued, these being conditions precedent to obtaining a patent under the statutes (section 2291, Rev. St., Act May 14, 1880, c. 89, § 3, 21 Stat. 140, 141, U. S. Comp. St. 1901, pp. 1390, 1393) under which this patent was issued; that Judd never entitled himself to a patent; and that his entry was properly canceled, because wrongfully obtained. The defendants obtained no right to the land or to the timber by their purchase from Judd. His entry and his conveyance to the defendants have no bearing whatever upon this action, save as they indicate whether the defendants appropriated the timber under such an honest belief in a legal right so to do as affects or limits the damages which otherwise would be recoverable from them.

After the plaintiff, in the course of asserting a claim adverse to Judd, had secured the cancellation of the latter's entry and the rejection of the defendant's claim thereunder, it was entirely competent for the land officers to give full effect to plaintiff's residence upon the land during the existence of that entry, if such residence was actual, and was begun and maintained in good faith, with a view to obtaining title under the homestead law. Counsel for the defendants call attention to a statute of Wisconsin (section 4765, Rev. St. 1898) purporting to give certain probative force to a final receipt or patent certificate issued under the land laws of the United States, and argue from this that the plaintiff was a mere trespasser during the existence of Judd's entry, and that his residence upon the land during that time could not be made the basis of any right, legal or equitable. There are two sufficient answers to this contention. One is that, before the plaintiff's residence during that period was made the basis of issuing a patent to him, the receipt or certificate issued to Judd had been canceled by competent authority because it was wrongfully obtained, and by that cancellation had been deprived of all probative force. *Guaranty Savings Bank v. Bladow*; *Thayer v. Spratt*, supra. The other is that a state cannot by its legislation restrict or affect the authority of the officers of the Land Department in the disposition of the public lands of the United States, or withhold from the grantees of the United States any of the incidents of the transfer of the government's title. *Bagnell v. Broderick*, 13 Pet. 436, 450, 10 L. Ed. 235; *Wilcox v. McConnell*, 13 Pet. 498, 516, 10 L. Ed. 264; *Irvine v. Marshall*, 20 How. 558, 564, 15 L. Ed. 994; *Gibson v. Chouteau*, 13 Wall. 92, 99, 20 L. Ed. 534; *Langdon v. Sherwood*, 124 U. S. 74, 84, 8 Sup. Ct. 429, 31 L. Ed. 344; *Paige v. Peters*, 70 Wis. 182, 35 N. W. 329, 5 Am. St. Rep. 156.

From what has been said, it is clear that the defendants are liable to the plaintiff or to the United States for the conversion of the timber, and that their only lawful concern is that they be made to respond only to the rightful claimant. Their liability is as certain as if the cutting had been a willful trespass, and the measure of the damages for the conversion is the same, whether the right of recovery is in the plaintiff or in the United States. We therefore return to the question whether the plaintiff's title under the patent relates back to a time anterior to the cutting of the timber, and entitles him to recover for its conversion. It will be observed that the question is not whether the doctrine of relation can be invoked to create a liability where otherwise there is none, or to defeat or impair an intervening right or equity of an innocent third person, or can be invoked by one whose default and laches will make its application operate unjustly upon another (*Evans v. Durango Land & Coal Co.*, 25 C. C. A. 531, 537, 80 Fed. 433, 438), or by a stranger to the title (*Gibson v. Chouteau*, 13 Wall. 92, 101, 20 L. Ed. 534), or can be invoked to avoid a liability otherwise existing (*United States v. Ball* [C. C.] 31 Fed. 667; *United States v. Freyberg* [C. C.] 32 Fed. 195; *United States v. Norris* [C. C.] 41 Fed. 424; *Teller v. United States*, 54 C. C. A. 349, 117 Fed. 577), or to make lawful an act which was criminal when done (*Teller v. United States*, 51 C. C. A. 230, 113 Fed. 273; *Teller v. United States*, 54 C. C. A. 349, 352, 117 Fed. 577, 580). Nor is the question whether a homestead claimant may, in advance of perfecting his claim into a full legal or equitable title, maintain an action against another for the value of timber severed from the land, which the homestead claimant could not have lawfully severed for purposes of sale. (*Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231. These several matters, whether determined or undetermined by existing decisions, are apart from the matter now under consideration, save as the principles controlling it may be applicable to them. While the doctrine of relation is of equitable origin, it has a well-recognized application to proceedings at law. By it "is meant that principle by which an act done at one time is considered, by a fiction of law, to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held, for certain purposes, to take effect by relation as of the day when the first proceeding was had." *Gibson v. Chouteau*, 13 Wall. 92, 100, 20 L. Ed. 534. Its purpose is to promote justice and to give effect to the lawful intention of the parties. Its most frequent application is to conveyances of real property or interests therein in pursuance of an antecedent contract, when, to give effect to the intention of the parties, or to protect purchasers from the vendee pending the fulfillment of the contract, the title is considered as having vested in the grantee not merely from the date of the actual conveyance, but from the time when the contract was made. The doctrine is also applied to public land transactions, when, to give effect to the intent of the statute or to cut off intervening claimants, the patent is deemed to relate back to the initiatory act. *Ross v. Barland*, 1 Pet. 655, 664, 7 L. Ed. 302; *Landes v. Brant*, 10 How. 348, 372, 13 L. Ed. 449; *Lessee of French v. Spencer*, 21 How. 228, 240, 16

L. Ed. 97; *Beard v. Federy*, 3 Wall. 478, 491, 18 L. Ed. 88; *Grisar v. McDowell*, 6 Wall. 363, 380, 18 L. Ed. 863; *Stark v. Starr*, 6 Wall. 402, 418, 18 L. Ed. 925; *Lynch v. Bernal*, 9 Wall. 315, 325, 19 L. Ed. 714; *Shepley v. Cowan*, 91 U. S. 330, 337, 340, 23 L. Ed. 424; *Weeks v. Bridgman*, 159 U. S. 541, 546, 16 Sup. Ct. 72, 40 L. Ed. 253; *United States v. Loughrey*, 172 U. S. 206, 218, 219, 225-231, 19 Sup. Ct. 153, 43 L. Ed. 420. Thus it was said in *Shepley v. Cowan*:

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office, and the patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

Other applications of the doctrine will be found in *Cothrin v. Faber*, 68 Cal. 39, 4 Pac. 940, 8 Pac. 599; *Jackson v. Bull*, 1 Johns. Cas. 81; *Id.*, 2 Caines, Cas. 301; *Jackson v. Ramsay*, 3 Cow. 75, 15 Am. Dec. 242; *Heath v. Ross*, 12 Johns. 146; *St. Onge v. Day*, 11 Colo. 368, 18 Pac. 278; *Musser v. McRae*, 44 Minn. 343, 46 N. W. 673. It conclusively appears, as before shown, that the timber was severed from the land after the initiation and during the maintenance of the plaintiff's homestead claim; in other words, while he had a conditional or inchoate right to the land, which was capable of perfection through compliance with the homestead law, and which in due course ripened into a full legal and equitable title before the commencement of this action. This conditional or inchoate right included an exclusive right to the possession so long as the plaintiff should comply in good faith with the requirements of the law controlling homestead claims, and included a further right to earn and receive the title. This right to the possession and to earn and receive the title extended to everything which was part of the land—timber as well as soil. The severance of the timber from the soil was a violation or infraction of the plaintiff's right to the possession, and of his right to earn and receive the title. It was an injury to both. It may be that the conditional or inchoate right of a homestead claimant is subject to a power in Congress to terminate it in whole or in part—as to the land or only as to the timber—at any time before it is perfected into a vested equitable estate by full compliance with the requirements of the law, but it is not terminable or subject to impairment by third persons. Unquestionably, in the absence of the exercise of such a power by Congress—and its exercise here is not claimed—the plaintiff was entitled, upon perfecting his homestead claim, to receive a conveyance of the land in the condition in which it was when his claim was initiated. The defendants made that impossible. When the patent was issued, the timber was gone. In its stead there existed a right of action for its conversion. Does not the promotion of justice—the due protection of the plaintiff's rights—require that his patent be held to relate to the date of his initiatory act, and thereby to invest him with that which now takes the place of the timber? We think it does. The terms of the statute are such that the presence of valuable timber on public land does not exclude it from homestead settlement or entry. It is therefore probable and reasonable

that the plaintiff, in selecting this tract from among others, was influenced by the value given to it by its timber. It was the intention of the government, by the homestead law, and was the intention of the plaintiff, in accepting the provisions of that law, that, upon his compliance with its requirements, he should be entitled to the land, with whatever advantages were incident to its natural condition and character, whether due to the fertility of its soil, or to its growth of timber. But for the act of the defendants, that intention would have been effectuated, and the timber would have passed to the plaintiff by the patent, as did the soil from which the timber was severed. It does not comport with the spirit of the homestead law to say that, after the initiation and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant. The law does not contemplate anything so unreasonable. The principles underlying and supporting the doctrine of relation are such that it may be as readily invoked to remedy or correct a loss such as is here disclosed, occurring while the claim was being perfected, as to prevent the loss of the entire right or title through an intervening claim. The plaintiff's title under the patent relates back to a time prior to the severance and conversion of the timber by the defendants, which was after the initiation of his claim, and entitles him to maintain this action.

The judgment is affirmed.

(129 Fed. 13.)

INTERNATIONAL NAV. CO. v. SEA INS. CO., Limited.

(Circuit Court of Appeals, Second Circuit. March 8, 1904.)

No. 113.

1. MARINE INSURANCE—SALVAGE EXPENSES—LAW GOVERNING APPORTIONMENT.

An English valued policy on a ship contained the provision: "General average salvage, and special charges as per foreign custom, payable according to foreign statements, * * * or per rules of port of discharge, * * * at the option of assured." *Held*, that under such provision the law of New York, the port of discharge, governed as to the amount payable by the insurer on account of salvage arising from stranding, there adjusted, and the insured was entitled to recover on the policy, in accordance with the law of the port, a sum which bears the same ratio to the entire salvage he was compelled to pay as the amount of the policy bears to the policy value of the ship, although the award was made on a higher valuation, and not, as by the law of England, only such part of said sum as bears the same ratio to the whole as the policy valuation bears to the valuation on which the adjustment was made.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here on appeal from a decree of the District Court, Eastern District of New York, in favor of the libellant, owner of the steamer *St. Paul*, claiming loss under a policy of marine insurance. The opinion of the District Court is found in 124 Fed. 93

Wilhelmus Mynderse, for appellant.
Henry G. Ward, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The St. Paul, on a voyage from Southampton, stranded on the New Jersey coast, and salvage services were rendered to vessel and cargo, as the result of which the vessel reached New York, having sustained physical damage involving serious repairs. The salvors took legal proceedings against vessel and cargo, and an award was made separately against each. The St. Paul (D. C.) 82 Fed. 104, affirmed by this court 86 Fed. 340, 30 C. C. A. 70. The award against the vessel (exclusive of the share to be borne by the freight) was \$129,914.57. A statement was made up by Johnson & Higgins, average adjusters, in which the salvage award against the steamer was claimed as a particular average, being added to the cost of repairs to the ship caused by stranding; the total amount being \$248,377.28. This statement was presented to the underwriters on the St. Paul, both in this country and in England. Some of the American underwriters refused payment of the claim under the said statement. Suit was brought in the District Court, Southern District of New York, and libelant recovered. *International Navigation Co. v. Atlantic Mutual Ins. Co.* (D. C.) 100 Fed. 304. That decision was affirmed by this court. 108 Fed. 987, 48 C. C. A. 181.

The respondent here is a British corporation, and issued the policy of insurance in London. The vessel was valued in all her policies at £275,000, and she was insured for the whole of that amount; the respondent underwriting £4,500. The salvage award was made on the basis of actual value in her salvaged condition, \$2,000,000 (£410,250); and her value in sound condition was \$2,100,000 (£441,025). The libellant claimed to recover ^{48/2750} of the \$248,377.28. The insurers contend that their liability for the salvage award is restricted to ^{48/2100} of ^{275000/441025} thereof. The conceded amount was paid, and this suit was brought to recover the difference. The question in dispute is whether, under a valued policy, where salvage has been awarded on a higher valuation, the insured can recover ratably from the several underwriters the salvage he has had to pay, or only such part of it as is in the same proportion to the whole salvage paid as the total policy valuation is to the valuation on which salvage was awarded.

No question seems to be raised as to the amount to be paid for repairs to the vessel. It will be perceived that the question presented is a single one, and the concessions of the respective parties have greatly simplified it. The respondent's method of calculation is in accord with English law. The libellant's is in accord with American law. For brevity of statement, the one may be called "nominal proportion"; the other, "actual proportion."

The policy is a British contract, and is to be interpreted accordingly. It is, however, "competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied, in whole or in part, according to the law of any foreign state, as if it had been made in and by a subject of the foreign state." Greer v.

Poole, 5 Q. B. D. 272. The policy of the defendant contains the following provision:

"General average, salvage and special charges as per foreign custom, payable according to foreign statements or per York-Antwerp rules, or York-Antwerp rules of 1890, or per rules of port of discharge, if in accordance with contract of affreightment at the option of assured."

Precisely this form of words is not found in any of the cases cited upon the briefs, but it seems to us reasonably easy of interpretation. As was stated before, without some such clause, the assured on a valued policy was liable to pay in some foreign port general average charges at one rate, and when he came to his underwriter for indemnity would be paid at a different rate, receiving less than he had paid, and not securing complete indemnity. The same rule applied to claims for salvage loss as to claims for general average loss. *Steamship Balmoral Company v. Marten*, L. R. App. Cases (1902) 511. Naturally the assured sought to correct this by some special provision which the underwriter might be willing to assent to. A provision quite frequently adopted was, "General average according to foreign custom;" also, "General average as per foreign statement." Such provisions have been considered by British courts, and in each instance it was held that the underwriter could not dispute the adjustment as to the propriety of particular items, or as to correctness of the apportionment, and was bound by the decision of the foreign average stater, or by the custom of the foreign port, both as to fact and law on the subject of general average. *Mavro v. Ocean Ins. Co.*, L. R. 9 C. P. 595; *The Mary Thomas*, Prob. Div. (1894) 123; *Harris v. Scaramanga*, 1 Asp. Mar. Cas. 344; *De Hart v. Compania Anonima*, 9 Asp. Mar. Cas. 345, affirmed 8 Commercial Cases, 314. The last citation contains the following:

"The general effect of the memorandum [to pay general average as per foreign statement, if so made up] is to make the underwriters liable as to general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. * * * If an adjustment has to be effected in a foreign port, it is obviously convenient that there should be a provision that in such a case the underwriter should stand in the shoes of those primarily liable upon it."

In none of the cases cited was the proposition raised, as it is here, that, although the assured might have paid general average charges on actual valuation, his claim for such loss should nevertheless be readjusted by scaling it down to a "nominal proportion." It would certainly seem that the manifest object of the clause would be defeated by so narrow an interpretation. "General average as per foreign custom" would be a declaration not wholly lived up to, if foreign custom made the assured pay on one basis, but the memorandum clause allowed him to collect only on another. No authority, British or other, is cited which is persuasive to so narrow an interpretation of a clause obviously intended to relieve the assured from the risk of meeting disaster without being compelled himself to meet the added risk of the geographical location of his ship when the loss was incurred and the port of safety was reached. Indeed, it would seem that the avoidance of this geographical risk was the genesis of the clause.

The phraseology of the clause in the policy now under consideration is broader than in the cases cited, for it submits to "foreign custom," whether there be an adjustment or not, "salvage and special charges." We concur entirely with the District Judge in the conclusion that under that clause the settlement of salvage losses under the policy must be in conformity to the law of the country in which the assured pays them.

The decree is affirmed, with interest and costs.

(129 Fed. 16.)

DICKINSON et al. v. SAUNDERS et al.

(Circuit Court of Appeals, First Circuit. April 13, 1904.)

No. 516.

1. FOREIGN CORPORATION—DECREE APPOINTING RECEIVERS CONSTRUED.

A decree appointing receivers for a foreign corporation, and directing that they continue to operate the property until otherwise directed, and from the moneys coming into their hands pay all sums due to employes and all expenses of carrying on the business, construed, under the circumstances, as requiring the receivers to pay from the proceeds of the corporation's property all claims for wages earned prior to their appointment, as well as wages earned thereafter.

2. SAME—PRIORITY—WAGES OF EMPLOYÉS.

Where a federal court could have acquired jurisdiction to appoint receivers for a foreign corporation only by consent of the parties, and no objection was made by any party to such appointment, or to a decree requiring the receivers to pay from the proceeds of the corporation's property all sums due employes, together with all the expenses of carrying on the business, the receivers could not thereafter, under the circumstances of this case, refuse to pay in full claims for wages earned by employes of the corporation prior to the receivers' appointment, none of which exceeded \$300 in amount, in preference to other unsecured claims.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Guy Cunningham, for appellants.

Henry T. Lummus (Charles N. Barney, with him on the brief), for appellees.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This appeal arose out of a bill in equity filed in the Circuit Court for the District of Massachusetts on the 7th day of August, 1902, by the Boston & Gloucester Steamboat Company and others against the Cape Ann Granite Company, incorporated under the laws of Maine, but said to have a usual place of business at Gloucester, in Massachusetts. The bill alleged that the Cape Ann Granite Company in March, 1894, executed a mortgage of its franchises and all its property to secure an issue of bonds, and that all the complainants were holders of portions thereof, either absolutely or as collateral security, and also of certain shares of capital stock;

that the mortgage was in default; that the defendant corporation had an amount of property of various kinds, and was largely indebted; that its property had been attached by various creditors; that the corporation was wholly insolvent, and that it was likely that a race of diligence would ensue between its different creditors, all of which would result in a multiplicity of suits, and in dismemberment and sale of its property by piecemeal and at a sacrifice; that its personal property, consisting principally of machinery and equipment, was of great value as attached to and part of its plant, but of little value when separated therefrom, and that the value of all its property consisted largely in its continued working operation as a unit; and that it was necessary, for the protection of its bondholders and creditors and for the preservation of its assets, that all its property within the jurisdiction of the court be taken into its judicial custody by the appointment of a receiver. Thereupon the bill prayed that the rights of the parties in interest might be ascertained and protected; that the court would administer the entire property of the corporation, and for such purposes would marshal its assets and enforce the various rights, liens, and equities; and that a receiver be appointed to take possession of all the assets, with authority to manage and preserve the same till the same should be sold and the proceeds distributed.

Thus the bill looked not merely to a foreclosure of the mortgage in which the complainants were interested, but to a winding up and distribution of the assets of the corporation, and the consequent intervening control and management of its affairs, with the view of making its assets of most available value. Thereupon, the same day the bill was filed, the appellants were appointed interlocutory receivers as prayed by the bill, and were authorized to retain possession of all the properties until sold, and to operate and continue the business until otherwise directed, and from the moneys coming into their hands to pay all sums due to employes and all expenses of carrying on the business. No objection to these proceedings seems to have been taken from any quarter, so that we have no occasion to consider any question except that which is now expressly before us.

Subsequently to filing the bill, on May 16, 1903, certain petitioners intervened, setting forth that they were "workmen and servants" employed by the defendant corporation during April, May, June, July, and August, 1902; that they had claims against it for the various amounts stated in the schedule attached to the petition, as wages earned during the months specified for labor necessary to its business from day to day; that the claims were contracted as a part of current expenses in the ordinary course; that the receivers had sold and converted into cash a large amount of personal property which was not covered by the mortgage in question; that they had applied none of the same to the payment of the claims of the petitioners, and had refused to do so; and that it was likely that the property and money remaining in their hands, if distributed among all the unsecured creditors, would be insufficient to pay in full. Thereupon they prayed that their claims might be allowed as

preferred, and have priority over all other unsecured claims, and that, so far as the petitioners were entitled to priority, the receivers might be ordered to pay them.

The receivers put in an answer to this petition, and objected to the granting thereof. There is nothing in the record showing a diversion of assets as alleged. With that exception, the case rests on the substance of the petition as we have given it. The court decreed that the debts of the petitioners should be allowed as preferred, and that the receivers should pay the same. From this decree the receivers seasonably appealed.

It does not appear that the assets of the defendant corporation have ever been disposed of under the form of a decree of distribution, but it is admitted that some of the property not covered by the mortgage has been sold by the receivers and converted into cash, which at the time of the filing of the intervening petition was in their hands. It also appears that thus the receivers have in their hands a sum, not bound by the mortgage, sufficient to pay the petitioners in full, but that such payments, if made, would leave almost nothing for the other unsecured creditors. The claims allowed by the court cover a period of something more than four months prior to the appointment of the receivers, and the total of some of them was in excess of \$100, but none in excess of \$300. The learned judge of the Circuit Court filed no opinion, so that the grounds on which he made his decree are not before us.

The record presents no equity in behalf of the intervening petitioners, other than that they were workmen. The defense rests on the ground that their claims differ in no way from any of the unsecured liabilities to which they ask to be preferred. The proposition is also made that the defendant is not a quasi public corporation, the continued operation of which is of general interest. The receivers maintain that the decisions of the Supreme Court allowing priorities relate to corporations which owe duties to the public, on which account, in order that there may not be a cessation of the performance thereof, they say special concessions have been made.

There have been numerous voluminous opinions of the Supreme Court with reference to priorities involved in the administration of the property of quasi public corporations like railroads, which it would be laborious and unnecessary to digest and classify. A late general statement of them will be found in *Southern Railway Company v. Carnegie Steel Company*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458. It is true that, so far as such corporations are concerned, the court has said that, inasmuch as they owe duties to the public, their mortgagees acquiring security thereon do it with the implied equitable undertaking on their part that no summary action by them shall interfere with the performance of such duties. Therefore it has been said that if mortgagees, instead of relying upon their strictly legal rights and legal remedies, see fit to go into equity, they must consent to equitable terms in reference thereto. In the same way the court has recognized another equity in behalf of indebtedness created from hand to mouth in favor of laborers, mechanics, and dealers supplying material for day to day operation, to the effect that, if mortga-

gees, after a railroad corporation becomes insolvent, accept payment of interest, and allow to be applied thereto moneys which ought to have been used in disbursing the cost of the operation of the property, another equity arises, by virtue of which what has thus been taken from the immediate hand to mouth creditors shall be restored to them. But the equity which is claimed here is of an entirely different character. It is simply a question between different classes of unsecured creditors; that is, between those who, on the one hand, are understood to give credit, and those who, on the other, furnish labor with no intention of credit, but with the expectation of immediately being paid from day to day out of the accruing earnings of the property. Therefore the questions arise whether there is such an equity, and, if yes, what is its extent? This equity, if it exists at all, is, of course, applicable to all classes of employers whose property comes into the hands of chancery for administration.

Some courts recognize this equity. Perhaps it never has been put better than in *Jones v. Arena Publishing Company*, 171 Mass. 22, 50 N. E. 15. The opinion in behalf of the majority of the court said at pages 27 and 28, 171 Mass., and page 16, 50 N. E., as follows:

"The questions whether taxes and debts due to workmen for labor are entitled to priority may be considered together. The relief sought is merely the getting in and the distribution of what are known in equity as 'legal assets.' In the course of the administration of assets, courts of equity follow the same rules in regard to legal assets which are adopted by courts of law, and give the same priority to the different classes of creditors which is enjoyed at law: thus maintaining a practical exposition of the maxim, 'Æquitas sequitur legem.'

"It would be a plain injustice if a general creditor, by resorting to equity for the administration of his debtor's goods, merely for the reason that by the aid of equity the amount to be divided would be larger, could gain a further advantage by reducing to the level of common creditors workmen whose wages would have priority if the assets were left to be administered at law, or could thus place his own debts upon an equality with taxes which would have been paid in full had not equity interfered. The defendant corporation was subjected to our insolvency law by force of St. 1890, c. 321; and, if equity had not come in to conserve and distribute its legal assets, the wages of its workmen and the taxes due from it would have priority in the distribution of its assets by the usual agencies of common law. Those agencies could not keep its business going at the time when the bill was filed. For this reason only, the creditors, merely to increase the amount of the fund, asked equity to interfere in behalf of all creditors alike. It would be unjust if that interference should be at the sole cost of the workmen and of the public, through depriving claims for labor and taxes of the priority of payment which they would have had if equity had not intervened."

At the time the decree appealed from was made there was an existing statute in Massachusetts, now found in Rev. Laws 1902, c. 150, § 29, as follows:

"The following claims shall, in the settlement of estates by receivers, be entitled to priority in the order named:

* * * * *

"Second. Wages to an amount of not more than one hundred dollars due to an operative, clerk or servant for labor, either performed within one year last preceding the appointment of the receiver or for the payment for which a suit, which was commenced within one year after the performance of the labor, is pending or was terminated within one year after said appointment."

The bankruptcy act of July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], provides priority for wages due to workmen, clerks, or servants, earned within three months before the date of the commencement of proceedings in bankruptcy, not to exceed \$300 to any claimant. Turning, therefore, either to the local statute, or to what, for the federal courts, is the higher authority, a priority in favor of creditors of the class of the interveners in this case is declared as a rule of administration, not only for quasi public corporations, but for all corporations, and in the federal statute for corporations and individuals. Although the statute of the state of Massachusetts could not, of course, control proceedings in the federal courts, and undoubtedly had no direct relation to receivers appointed by those courts, and although it may be possible for the appellants to claim that this particular corporation was not within the classes of corporations subject to proceedings under the bankruptcy statutes, yet each legislative system declares a policy which a chancellor, in hunting about for some analogy to guide the equitable administration of his office, might lay hold of under some circumstances. While not strictly bound by either, he might be justified, if his duty required it, in taking into consideration each or both in disposing of a question like that before us.

Judicial discretion, it is true, is subject to rules, and not arbitrary. It must, of course, be governed by reasonable considerations, and is so far from involving pure discretion that it may be reviewed on appeal. The present case, however, is peculiar in such substantial respects that it does not require that we should sharply determine the questions suggested; and it affords little opportunity for our revising the action of the Circuit Court, unless clearly unreasonable. The defendant corporation having its habitat in Maine, the Circuit Court for the District of Massachusetts had, according to well-settled rules, no jurisdiction over a bill of the character in question, unless by consent; and that it took jurisdiction implies that it was by the consent, and, indeed, it may be said at the request, of all the parties to the proceeding. No one intervened to object thereto. The statutes of the state of Maine, where this corporation was created, provide precise and peculiar methods for winding it up and distributing its assets, which neither contemplate nor authorize a proceeding of the kind instituted in the Circuit Court. Neither do the statutes of Massachusetts provide for proceedings of this character with reference to foreign corporations. Neither was the case framed to come within the eighth section of the act of March 3, 1875 (18 Stat. 472, c. 137), providing specially for the administration of real or personal property within the district. The extent to which the authorities have given federal courts jurisdiction in their own right with reference to winding up corporations or marshaling their assets is in instances where the state statutes provide for their dissolution, and for equitable proceedings for that purpose, which, of course, may be adopted by the federal courts, as in *Terry v. Commercial Bank of Alabama*, 93 U. S. 454, 23 L. Ed. 620, and in *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178, or in instances of ordinary creditors' bills after judgment and execution returned nulla bona, like *Central Trust Company v. McGeorge*, 151 U.

S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, or in instances when called on to collect and dispose of the assets of dissolved corporations, domestic or foreign. The case, therefore, against the Cape Ann Granite Company, as made in the Circuit Court, was purely of the parties' own selection, as well as was the tribunal itself.

But in this case the distinctive feature is that the decree appointing the receivers contained the following direction which we have already stated, namely: "From the moneys coming into their hands to pay all sums due to employés and all expenses of carrying on said business." That the expression "sums due to employés" means the very sums in controversy here, follows logically from the fact that all wages due them, accruing after the appointment of the receivers, were covered by the words "all the expenses of carrying on said business." Therefore the expression "all sums due to employés" means sums due at the time of the decretal order appointing the receivers, and which accrued before it. It has for a long time been customary, where parties apply for interlocutory receivers of a going concern, for the court to insert some provision of this character in the decretal order appointing them. Sometimes this is done at the motion of the court or of one of the adversary parties. Under such circumstances, some of the observations in *Kneeland v. American Loan & Trust Company*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, apply, so that, even though the order appointing interlocutory receivers designates certain rights of priority, this will not justify an unreasonable exercise of judicial power in reference thereto.

The present record, however, shows that the decretal order appointing the receivers was summarily entered on the same day with the filing of the bill against the defendant corporation; and inasmuch as, for the reasons we have already stated, the proceedings under the bill must have been by the consent of all concerned, it is a reasonable interpretation of the record that the decretal order, and all the terms thereof, were simultaneously assented to by all concerned. Under those circumstances, the observations in *Kneeland v. American Loan & Trust Company* have no pertinency, unless there was a clear mistake or clear injustice, or unless it appeared that new parties, having an interest not represented before the court when it took jurisdiction and appointed the receivers, had subsequently intervened. Nothing of either kind appears here. So far as the record shows, the parties to it are the same who came into the court originally and voluntarily agreed to all that occurred. The proceeding was therefore purely voluntary on all sides. The complainants in the original bill in the Circuit Court must be assumed to have understood the probability that, unless a provision like that which we have cited was inserted in the decree, the corporation might be held to be within the statutes of bankruptcy, and proceeded against accordingly, in which event substantially the same priorities would have been acquired as are now sought to be enforced. We must therefore hold that it is in harmony with the reason of the case, and with the probable intention of the parties, that the provision which we have cited from the interlocutory order appointing the receivers, with reference to "sums due to employés," is to be construed as we construe it. As we have already said, we must hold that this ex-

pression was voluntarily assented to. It follows that, as parties to the original proceeding have got whatever advantages they could out of it, they must accept the consequential burdens.

It is not essential that the bankruptcy statutes were not strictly applicable to this defendant corporation, if such were the fact. It is sufficient that there was a probability that they were. The same is true as to the fact that the time limit in those statutes for preferred wages is three months, while the limit in the case at bar appears to have been four. No amount allowed any employé by the order appealed from was equal to the maximum permitted by the statutes, so that, merely on account of the departure as to length of time, it cannot be said that the policy declared by Congress is inapt or was not sufficiently regarded. Taking this analogy in connection with the peculiar circumstances of this proceeding to which we have referred, including the provision which we have cited from the decretal order appointing the receivers, and the circumstances under which it was assented to, it is impossible for an appellate tribunal to find that there was anything unjust in the requirement of the Circuit Court that that provision should be literally and fully complied with.

Therefore, without definitely deciding that the rules with reference to receivers of corporations of a quasi public character can be properly extended to other employers, we are required by the peculiar circumstances of the case before us to affirm the decree of the Circuit Court. In this we reach, under substantially the same circumstances, the same conclusion as was arrived at by the Circuit Court of Appeals for the Fifth Circuit, with reference to a corporation organized for mere private gain, in *Reinhart v. Augusta Min. & Inv. Co.*, 94 Fed. 901, 36 C. C. A. 541.

The decree of the Circuit Court is affirmed, and each party will pay its costs on appeal.

(129 Fed. 22.)

MINNESOTA S. S. CO. v. LEHIGH VALLEY TRANSPORTATION CO. et al

LEHIGH VALLEY TRANSPORTATION CO. v. MINNESOTA S. S. CO. et al

(Circuit Court of Appeals, Sixth Circuit. March 22, 1904.)

Nos. 1,229, 1,230.

1. COLLISION—SUDDEN SHEERING OF VESSEL—BURDEN OF PROOF.

A vessel which suddenly sheers from her proper course in ordinary weather, in a fairly ample space for navigation, and under no apparent stress of circumstances occurring without her fault, and, in consequence of such sheering, comes into collision with another vessel, is presumptively in fault for the collision, and has the burden of exonerating herself.

2. SAME—STEAM VESSELS MEETING—PROCEEDING AHEAD IN CHANNEL.

The steamer *Mariposa*, with the barge *Martha* in tow on a line 600 feet long, both heavily laden with iron ore, was coming down the dredged channel through Lake St. Clair in the evening at a speed of about 7 miles; the channel being 800 feet wide. When near the south end of the cut, signals for passing port to port were exchanged between the *Mariposa* and the steamers *Troy* and *Wilbur*, which were coming up lightly laden, and were then just below the bend at the entrance to the channel, and about three-fourths of a mile away. The two steamers came on abreast the *Troy* on the starboard side, and the *Wilbur* about 40 feet away, at a

speed of 13 miles or more, and passed the Mariposa safely, but about that time the Wilbur took a sudden sheer to port, and struck and sunk the Martha. The weight of testimony tended to show that when the signals were exchanged the Mariposa was about on the range line in the middle of the channel; that she then ported, and, on seeing that the two meeting steamers were abreast, ported again, the Martha following each time, and that at the time of collision they were each about 150 feet to the westward of the center of the channel; also that the Wilbur passed the Mariposa at a distance of about 50 feet, and was at no time east of the range line. She called to the Troy to stand off and give more room, which being refused, she slackened speed just before meeting the Mariposa, which brought her stern within the suction at the stern of the Troy, and caused the sheer. *Held*, that neither the Mariposa nor the Martha was in fault, it appearing that the latter ported again on seeing the Wilbur sheer, but could not then get out of the way, but that the collision was due to the fault of the Wilbur and the Troy, for coming up abreast, as they did, so near the center of the channel; the Troy also being in fault for unnecessarily crowding the Wilbur toward the meeting vessels.

3. ADMIRALTY—TRIAL—EXCLUSION OF EVIDENCE.

In the trial of an admiralty cause, where the testimony is taken before the court, all testimony offered, although objected to, should be admitted, subject to the objection for the benefit of the appellate court, unless so utterly irrelevant or immaterial that there can be no question of its inadmissibility.

Appeal from the District Court of the United States for the Eastern District of Michigan.

These are appeals from a decree of the district court, in admiralty, rendered in a cause of collision between the steamer E. P. Wilbur and the barge Martha on the evening of October 26, 1900, near the lower end of Lake St. Clair, and in a channel or cut extending from a point not far above the place where the waters of the lake pass down into the Detroit river, upward through the shoal water of the lake for several miles. The channel is straight, is 20 feet deep, and of the width of 800 feet. The Peche Island Range, running through its center, makes a course about two points to the left of the last course below on which vessels come up out of the Detroit river. The western side of the channel is marked by white lights a mile and a half or more apart. On the eastern side are red lights opposite to the others, and, of course, the same distance apart.

The steamer Mariposa, with the Martha in tow, on a line 600 feet long, both laden with iron ore, was coming down the channel on her way to Lake Erie ports. The Wilbur was going up, lightly laden, and was moving alongside the steamer Troy, also going up, lightly laden; the Wilbur being on the port side of the Troy. Signals were exchanged between the Mariposa and the Wilbur and the Troy in due season, while the two latter were below the cut, and nearly three-quarters of a mile distant from the Mariposa, signifying an agreement to pass on the port hand. The Mariposa was moving at a speed of about 7 miles an hour, and the up-bound steamers at a speed of 13 miles, or a little more. The Wilbur and the Troy passed the Mariposa at a safe distance and without trouble, but at that time the Wilbur took a sudden sheer to port, and, striking the Martha on the bluff of her bow, broke into that vessel for a distance of 26 feet, and beyond her collision bulkhead. The bow of the Martha immediately filled with water and sank to the bottom. The after part of the vessel floated for a brief time, and then went down. The damage from the collision to the Martha amounted to \$43,000 and over, and the Wilbur sustained damage to the amount of over \$15,000. The collision occurred about half past 9 o'clock, a half mile above the lights at the lower end of the cut. The night was somewhat dark, though the weather was clear and calm. There is a current in the cut of about a mile an hour. The Mariposa was 330 feet long. Her breadth of beam was 45 feet, and her draught 17 feet. The Martha's length was 352 feet, her breadth was 44 feet, and her draught 17 feet and 6 inches. The Wilbur was 290 feet long, 40 feet beam, and 14½ feet

draught. The Troy was 402 feet long, 45 feet beam, and had a draught of 14 feet. More particular details of many of the principal facts are stated in the opinion, which follows.

The owner of the Martha, the Minnesota Steamship Company, libeled the Wilbur and the Troy for her damage: alleging that the misconduct of the latter contributed to the sheer of the Wilbur, whereby the mischief was done. The Lehigh Valley Transportation Company, claimants of the Wilbur, answered for that vessel, denying all fault, and, by cross-libel and petition, charged the Troy, the Mariposa, and the Martha with responsibility for the damages suffered by the Wilbur. The Western Transit Company, claimants of the Troy, answered, denying all fault, and by petition brought in all the other vessels; charging them with various faults, and praying that they be charged with the damages ensuing in exoneration of the Troy. Answers to the cross-libel and petitions having been filed, and testimony taken, the parties were heard thereon. By the decree the Wilbur and the Mariposa were condemned, and each decreed to pay one-half of the whole damage. The Troy and the Martha were exonerated. The Minnesota Steamship Company and the Lehigh Valley Transportation Company have severally appealed.

Hermon A. Kelley (Hoyt, Dustin & Kelley, of counsel), for appellant Minnesota S. S. Co.

John C. Shaw (Martin Carey and Shaw, Warren, Cady & Oakes, of counsel), for appellant Lehigh Valley Transportation Co.

Harvey D. Goulder (S. H. Holding and F. S. Masten, of counsel), for appellee Western Transit Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having made the preceding statement, delivered the opinion of the court.

The outline of the controversy, as above shown, indicates that we should first consider the case of the Wilbur, whose sudden departure from her course was the immediate cause of the disaster. Having regard to the general facts already stated, without more, a presumption of fault on the part of that vessel arises, which she takes the burden of dispelling. She is bound to explain how it was that, in ordinary weather, in a fairly ample space for navigation, and being under no stress of circumstances occurring without her fault, she should have been suffered to go off on so dangerous a course. *The Olympia*, 61 Fed. 120, 9 C. C. A. 393; *The F. W. Wheeler*, 78 Fed. 824, 24 C. C. A. 353; *The Mitchell Transportation Co. v. Green*, 120 Fed. 49, 60; 56 C. C. A. 455; *Davidson v. American Steel Barge Co.*, 120 Fed. 250, 56 C. C. A. 86; *The Australia*, 120 Fed. 220, 222, 224, 56 C. C. A. 568.

She has endeavored to explain, by charging that her sheer was produced by the improper conduct of the Troy and the Mariposa, in that those vessels wrongfully and unlawfully maintained a course so close to her, on either hand, that she could not control her own movements, and was powerless to avoid the disaster to which those vessels impelled her. But her answer gives color for a belief which is abundantly confirmed by the testimony that the Wilbur and Troy had been coming up the river ever since they left Detroit, eight miles below, at a rapid gait abreast of each other, "neck and neck," as one of the officers of the Troy expresses it in his testimony, apparently struggling for precedence. It appears that, when the vessels arrived at Detroit, the Wilbur was ahead, but that she stopped or slackened speed there momentarily, to pick up the mailboat, and the Troy got by her, or nearly by her, before

she got under full speed again. At all events, she drew up alongside of the Troy, and the vessels maintained that position, at varying distances apart, going up the river at a pace so rapid as to attract the attention and remark of those they passed, and exciting apprehension of danger to other craft which they met or passed. The court below was complaisant enough to accept the statement of the officers of the Wilbur and the Troy that they were not racing. But it matters little by what expression their conduct is characterized. We are convinced that the purpose of those on each of the steamers was that the other should not be allowed to get ahead of her, and that they were more intent on that purpose than to observe the habits of prudent navigation of their ships. The officers of the Wilbur say that she came around for the entrance of the cut only a few feet—30 to 50—from the lower white light on the west side, and the Troy was about the same or a little further distance off on the starboard hand of the Wilbur. We are not prepared to say that, if these vessels had been proceeding separately, their speed was improper; and there is no reason to suppose in the present instance that, if the vessels had come up singly, the disaster would have occurred. But they had no sufficient reason for supposing that those coming down would know that they were coming up in that form, and would make preparation to give them a wide berth. The danger of sudden sheers from passing other vessels, especially when going at great speed, is well understood; and the danger is increased when two vessels are moving in the same direction, close to each other, but at varying speed, so that the stern of the one is liable to fall into the trough behind the other. The result in this instance is one of which there was risk. A prudent navigator would have taken account of it. A giddy one, intent on a contest of speed, might not. The captain of the Wilbur testifies that he was conscious of the risk; that he did not like to have the Troy so near him; that he felt uncomfortable; that he checked twice to permit the Troy to go ahead before they entered the channel, but that she did not, and came up into the cut not more than 100 feet away from the Wilbur. But he also says that there would have been no difficulty in checking the Wilbur to the extent necessary in order to follow the Troy, and it is manifest this was so.

When the captain of the Wilbur testifies, as he does, that his sense of the danger he was in became so great after the two steamers rounded to, and were about to meet the down-bound vessels, that he checked his own vessel, and that she immediately began to sheer, and he was unable thereafter to stop her until the collision happened, the immediate cause of the disaster becomes clear. The Troy was considerably larger than the Wilbur. The sterns of the vessels were opposite. The stem of the Troy was 100 feet in advance of that of the Wilbur, and the two vessels were on parallel lines, and about 40 feet apart. When the Wilbur checked, her stern was sucked into the wake of the Troy by the inflowing waters at the stern of the latter; and this influence, combined with the impact of the water displaced by the bow of the Troy upon the forward starboard side of the Wilbur, and the high speed at which the vessels were moving, would naturally effect the uncontrollable sheer which the captain of the Wilbur says his vessel experienced. As the speed of the vessels was still nearly alike, these

influences were not momentary, but were sustained for a time. It is contended on the part of the Wilbur and the Troy that the Mariposa produced, or at least contributed to produce, the sheer of the Wilbur. But that vessel, by the account of the Wilbur herself, was nearly twice as far away from her as the Troy. Besides, she was a meeting vessel, and in such case her influence was only momentary; and, her speed being moderate, the suction at her stern could not have been great—not greater than would be frequently experienced in ordinary navigation.

The influences which operated here, and which are so constantly observed by intelligent seamen, were discussed and in great measure explained by this court in the case of *The Alexander Folsom*, 52 Fed. 403, 3 C. C. A. 165. And in several cases since we have had occasion to observe their decisive effect in contributing to disastrous collisions. *The Ohio*, 91 Fed. 547, 33 C. C. A. 667; *The Fontana*, 119 Fed. 853, 56 C. C. A. 365; *The Australia*, 120 Fed. 220, 56 C. C. A. 568.

When the steamers came around into the channel, they knew what the position of the Mariposa and her tow was. If there was danger, they could see it. They were three-quarters of a mile off. But they at no time gave any signal to the Mariposa of apprehended danger. For reasons which we shall state hereafter, we are convinced that the Mariposa and the Martha were for some distance, before they met the up-bound steamers, on the western side of the middle of the fairway or dredged channel. It is certain, and it is the one thing about which there is no dispute, that the Wilbur and the Troy were advancing abreast and very close to each other—not more than 40 feet apart. Those on the Wilbur called to the Troy to stand off and give the Wilbur more room, or to check her speed. This request was met by an obstinate refusal. The Troy justifies herself by the allegation that she was already well over to the eastern side of the channel, and could not prudently give more room. Moreover, the captain of the Troy testifies that there was ample distance between the Troy and the Mariposa and her tow to allow the Wilbur free passage by, with proper management. And here we stop to notice the attitude of the Troy and her testimony in making her defense. Her officers are responsible for the story that, at the time the Wilbur sheered off, the Troy was about 40 to 50 feet from the eastern side of the channel; that the Wilbur was abreast of her (that is, their sterns were opposite each other); that the Mariposa was on a course 250 feet westward of the Troy. This would bring the Mariposa considerably east of midchannel. We think this testimony savors of a self-serving purpose, and, in respect to the Troy's position in the channel, it is so opposed to the weight of the testimony, and the probabilities arising from facts which we feel quite sure of, that we are constrained to regard it as unreliable. We refuse to believe that the Troy was where she says she was, and are convinced that the complaint of the Wilbur that during the critical period the Troy wrongfully crowded her too far over to the westward is well founded. As will be shown later on, sufficient reasons appear for believing that the collision occurred quite to the westward of the middle of the channel, and at a place where the Wilbur had no right to be; and, further, that she has not excused herself for being there. We

think the Wilbur was at fault in not taking counsel of her fear, and in going up alongside of the Troy at the speed they were moving—a menace to meeting vessels. We do not say that of itself her checking her speed in extremis was an actionable fault. But she voluntarily placed herself in a position where she was liable to be in extremity. She cannot, therefore, plead the peril she came into as an excuse. *The Australia*, supra; 7 Cyc. 309.

From the necessity of the case, we have been obliged, in discussing the conduct of the Wilbur, to deal with the conduct of the Troy also. We think she shared in the fault of the Wilbur in going up the channel in the relation with her that she held, and at the speed they maintained, and that she unnecessarily crowded the Wilbur into too close proximity with the course of the *Mariposa* and the *Martha*—whether from perversity or recklessness, we do not say—and refused to give room, when she had ample opportunity for doing so without danger to herself, when she knew of the straits the Wilbur was in. Her fault was even greater than the Wilbur when the final catastrophe was brought on.

When we say the Troy crowded the Wilbur into too close proximity with the *Mariposa* and the *Martha*, we have in mind the speed of the Troy and the Wilbur, and their relation to each other.

Counsel for both the Wilbur and the Troy have given considerable space in their briefs to the question as to which of those two vessels was to be regarded as the one overtaking the other, with a view to claiming for their respective vessels the privilege given by rule 22 (Act Feb. 8, 1895, c. 64, 28 Stat. 649 [U. S. Comp. St. 1901, p. 2891]), to the one overtaken. The claim of the Troy is that she passed the Wilbur while the latter was under check at Detroit, and thus gained the favored position. For the Wilbur it is claimed that the Troy came up only to a position where she lapped the Wilbur, and did not deprive the Wilbur of the leading position. We do not feel called upon to decide this question. A disagreement over such a matter furnished no apology for engaging in a reckless contest in navigable waters, and putting others who were exercising their lawful rights therein to hazard and ultimate loss; nor did it give either the right to obstinately persist in a course which would bring the other into peril.

It remains to consider what judgment ought to be pronounced in regard to the *Mariposa* and the *Martha*. If the testimony of the officers of these vessels is to be believed, there is no reasonable ground for thinking that either of them was at fault. From that it would appear that, in coming down through the cut, they first met the *Majestic*, a steamer going up, and, turning to starboard, passed her by the port hand. Thereupon they swerved back toward the range line, when, the signals for passing the steamers below having been given and answered, they again turned out to starboard, and proceeded on that course until they saw the vessels coming up abreast of each other, when the *Mariposa* ported again; the *Martha* following her. The steamers passed the *Mariposa* safely, the Wilbur being rather close and already beginning to sheer. Nothing could then be done. Only the fraction of a minute elapsed after the Wilbur passed the *Mariposa* before the crash came. Meantime the *Martha*, seeing the Wilbur coming, had vainly

ported again. The stem of the Wilbur stove in her port bow, and penetrated to the collision bulkhead. The distance from her bottom to the bed of the channel was only $2\frac{1}{2}$ feet, and she sank on her fore foot immediately. The after part swung around somewhat to port, filled, and went down. The captain of the Martha did not pay attention to the range, but kept his vessel properly headed on his steamer. No fault can be found if he did as he says. For the Wilbur it is urged that he ought to have seen the sheer of the vessel earlier, and have taken measures to get out of the way. But the combined speed of the meeting vessels was 20 miles an hour. When the Wilbur was first perceptibly sheering off, she was probably not much, if any, more than 1,000 feet from the Martha. They would come together in from one-half to three-quarters of a minute. We do not think it would have been possible for the Martha to have escaped. Besides, the peril was extreme from the time the sheer became decisive; and we should think the indulgence due to his situation would excuse the master of the Martha, even if he did not do all that he might have done, or did not do it as quickly as he would but for the excitement of the moment. The Ohio, 91 Fed. 547, 33 C. C. A. 667; The Bywell Castle, 4 Prob. Div. 219; The Elizabeth Jones, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812; The Maggie Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

The testimony of those navigating the Mariposa was given by those who were charged with that special duty, and they give the course, which they run with particular reference to the range lights which they say they all the while observed. It is a standard rule, approved by many decisions, that "more weight is to be given to witnesses who testify as to the movements of their own vessel than to witnesses on other moving vessels or onlookers." 7 Cyc. 397, tit. "Collisions," where numerous cases are cited. There is other testimony, however, to which we are referred, tending to a different conclusion in reference to some of the questions involved—mainly, however, to the question on which side of the channel the collision occurred. This testimony comes from those not on the Mariposa or the Martha, and who, from lack of observation or the opportunity of observation, testify from estimates made from their recollection of the situation. There is nothing based on certain data which conflicts with the testimony of the officers of the Mariposa. Moreover, the testimony of these latter, as respects the point now in question, is corroborated by the position in which the Martha was found by the wreckers, and this is shown beyond doubt to have been athwart the channel; her head lying 175 feet west of mid-channel, and her stern extending just over it. This was her position when she went down. When it is remembered that she was heavily laden, and the blow of the Wilbur was a violent and crushing one, we do not think it probable that she was carried by the shock very far out of her course. Both her captain and the watch testify that the bow of the Martha dropped instantly, and did not swing after the collision. These indications point to the conclusion that the fore end of the Martha sank quickly to the bottom, and that her stern was turned around to port on the pivot of her fore foot by the pressure of the current while her stern was sinking. If this conclusion is correct, the fair inference

is that the place where the vessels came together was as much as 150 feet to the westward of midchannel. The course taken by the Wilbur on turning around the lower light on her port side to go up the cut also tends to confirm the testimony from the Mariposa. As we gather from the testimony of those concerned with the navigation of the Wilbur, she passed about 40 feet distant, and then steadied to a bearing on the second red light on the eastern side of the channel, $1\frac{1}{2}$ miles distant. As the collision happened only one-third of that distance up, it seems more than doubtful whether the Wilbur could have crossed the range line in the middle of the channel when she sheered off to the westward. If that be so, the whole departure of her sheer was in the western half of the channel, and locates the Mariposa and the Martha about where they say they were. And in the cross-label of the Wilbur she avers that, as they were meeting the Mariposa, the Troy, "instead of checking or directing her course to starboard in accordance with the announced intention, kept her speed and held near the center of the cut." As the Wilbur was on the port side of the Troy, and 40 feet away, and her own width was 40 feet, and she passed the Mariposa 50 feet distant, the Mariposa having a breadth of beam of 40 feet, it would follow that the Mariposa's course was 150 feet to the westward of midchannel.

It is contended for the Wilbur that the Mariposa should have known that the Wilbur and the Troy were coming up abreast, and that they would need more ample room than she gave them. We think that she gave them ample room, whether she knew they were coming abreast or not. But we think, also, that there is no just ground for contending that while the steamers were below the cut the Mariposa should be expected to know that the steamers were coming abreast. The lights of other vessels were there. The Troy and the Wilbur had separated somewhat at that time, and there was nothing in the indication of their lights from which alone their position could be seen, which should warn the vessels above of any such intention. After they made the turn and began to come up, they could, we should suppose, be seen, and probably were, for the Mariposa ported again. All the while the latter vessel was entitled to suppose that, passing signals having been given and understood, the steamers would turn out when it should become necessary; and this expectation might justly last until it became evident they were not doing their duty. When this did become evident, the Mariposa could have done nothing to mend the situation. At the speed the steamers were going up, it was scarcely two minutes from the time they came around the lower light until they were passing the Mariposa. If the Troy had ported, as she should, there probably would have been no trouble. And as it was, it is very doubtful whether there would have been any collision if the master of the Wilbur had not incautiously checked his vessel, and thus subjected her to the influence by which she was turned off. Neither the Wilbur nor the Troy is privileged to charge it as the fault of the Mariposa that she relied on them to do their duty, so long as they did not clearly show that they did not intend to do it.

We observe that in a number of instances the district court, upon objection, excluded testimony tendered at the hearing (which was had

in open court) upon various grounds which were assigned by the court. In several of these instances we think the testimony tendered and rejected was material and competent. But it happens in this case we are able to form definite conclusions without the aid of that which was rejected, and that which was rejected was in support of these conclusions. We think, however, we should call attention to the error and inconvenience of this practice. If the court of first instance was empowered to make the ultimate judgment, there might be little or no objection to the course pursued. But as its determination is subject to appeal, and the appellate court might have a different opinion in regard to the competency and materiality of the rejected testimony, the difficulty becomes obvious. In such circumstances it might become necessary to undo all that had been done subsequent to the taking of the testimony and go over the ground again, and thus involve much cost and delay. The proper course is to receive the testimony tendered, subject to the objection, unless, indeed, it be so utterly irrelevant or immaterial that there could not possibly be any doubt about it. The power of the court to punish with the costs the bringing in of flagrantly indirect and useless testimony should ordinarily be a sufficient deterrent.

We think the district court was right in holding the Wilbur and discharging the Martha, but we cannot approve its decree in discharging the Troy and holding the Mariposa. We are very clear that the Wilbur and the Troy were the parties who should be held responsible for the disaster, and should be condemned to pay the damages. Upon the conclusions already stated, and the reasons given therefor, we think the Wilbur and the Troy should satisfy the damages of the former by equal contribution; the lien of the Wilbur to be subordinate to that of the owners of the Martha for her damage.

The decree of the district court, so far as concerns the responsibility of the Wilbur and the Martha, is affirmed as herein modified by the judgment against the Troy, with costs of both courts. So far as it concerns the responsibility of the Mariposa and the Troy, it is reversed, with directions to enter a decree charging the Wilbur and the Troy with the damages of the Martha and interest, and with the costs of both courts, to be collected one-half from the stipulators for each, with the proviso that, if such moiety cannot be collected from each, recourse may be had upon the other to the extent of its stipulation above the sum of such other's moiety of damage decreed against her, and charging the Troy, in favor of the Wilbur, with one-half the damages of the latter, with interest thereon; each of those parties to pay its own costs here and in the court below, the lien of the Wilbur to be subject to that in favor of the Martha upon the Troy for her damage, interest and costs, as herein decreed.

Following will be found the opinion of the court below :

SWAN, District Judge (orally). The three steamers which figure in this case are all charged with fault—the Wilbur, the Troy, and the Mariposa. So far as the Troy is concerned—for I will commence at the easiest end of the case—the situation is this: I find, as I stated during the argument, that the Troy passed the Wilbur when nearly abreast of Woodward avenue; that the Wilbur there renounced her priority of right, and made herself the overtaking vessel. I think that is the fair weight of the testimony. There is on this

point the usual conflict of evidence that attends admiralty cases, and would attend any case, whatever the subject-matter, where the witnesses must speak as to matters that are not plainly visible, not illuminated by daylight—the matters occurring in the dark; but I think that the Troy was thenceforth continuously ahead—at some times further ahead than others. If we throw out all the interested testimony in the case, it fairly appears in the testimony of the mail carriers—the two witnesses from the mailboat, whose names have escaped me—that the Troy had fairly cleared the Wilbur while the latter was waiting for the mail. That being the case, the Wilbur was to her an overtaking vessel. That continued to be the relation between them, and gave to their navigation the appearance of being engaged in a contest of speed. Both masters deny that their course up the river had any such character, and I must accept their denial, and believe they were going up there at their ordinary gait—12 or 13 miles an hour, though I think the man that was ahead was very glad to keep his position, and the man behind would have been glad to have exchanged with him. They proceeded upon the usual course, both of them being competent mariners, and I believe both mean to tell the truth—they proceeded upon the course which each regarded as safe. There was nothing to intimate danger to them, nothing to induce apprehension. They ran at a speed of 12 or 13 miles an hour, keeping safely away from each other and from other vessels, and navigating without incident until they had entered the mouth of the cut or dredged channel of Lake St. Clair, when they exchanged signals with the steamer Mariposa, which had the schooner Martha in tow; bound down. The Mariposa at that time was about midchannel, and I do not think changed that position. I think she came down with the usual inclination of a vessel having the ranges and being on the ranges to adhere to them. I won't use the term commonly applied to that navigation which monopolizes the ranges, because it is habitually done by most masters, often from timidity inspired by the size and draft of the vessels—a morbid fear of possibly grounding if on either hand of midchannel. The signals between the Mariposa, the Troy, and the E. P. Wilbur were seasonably exchanged. The mutual relations of the Troy and of the Wilbur continued safe as they went up the cut until just before they came abreast of the Mariposa. That is the testimony of Capt. Gillies. It is the testimony of Capt. Fuller. Neither of them saw any appearance of danger in the situation, and both approved its safety until just before the collision. Now, each vessel, there is no doubt, had a right to go up there just as fast as she could, provided she exercised that right with due regard to the interest and safety of others; and the vessel that was ahead had a right to keep ahead, if she could, providing, as I say, she exercised that right reasonably. Therefore the Troy is not censurable for keeping ahead, as she was safely away from the Mariposa and Martha. Nor is the Wilbur to be condemned for getting along as fast as she could, but, as she was the overtaking vessel, she was bound to exercise that right with much greater circumspection, so as not to approach too closely to the Troy, or bring herself within the operation of the latter's suction; and, if she did so, she must abide the consequences. She put herself voluntarily in that position. She could not lawfully attempt to pass the Troy without the latter's consent, for which she did not ask. According to the testimony, they were at a safe distance from each other, and there was no sign on the part of either boat that it was affected by the proximity of the other until they were getting nearly abreast of the Mariposa. Then it was seen by the master of the Wilbur that his vessel was dropping off to port and towards the course of the Mariposa. It then became his instant duty to check or drop behind the Troy. This he failed to do, but, in his efforts to avoid the Mariposa, drew in so closely to the Troy as to get within her suction, when, of course, and as was to be expected, the Wilbur sheered to port, and held her sheer until she struck the Mariposa's consort, the Martha. No fault can be imputed to the Troy. I think she was navigating properly, and I do not think Capt. Fuller's testimony—any reading of it—will condemn Capt. Gillies' conduct there. Capt. Fuller, as was pointed out in the argument, did not question that the Troy was as far east as she could go, and his judgment upon her course is confirmed by Mr. Montgomery, the lookout of the Wilbur. The witnesses on the Wilbur agree that the distance between the vessels was 75 or 100 feet, until they had proceeded up the cut

some distance, and pronounced that distance safe. When it was reduced to 30 or 40 feet or less by the approach of the Wilbur to the Troy, that was the voluntary act of the Wilbur, which the Troy could not prevent, and for the consequences of which she cannot be condemned. The Troy's witnesses testify that the steamers were much further apart coming up the cut, and when the Wilbur took her sheer; but as the duty of keeping clear was, by the White Law Rule 22, and pilot rule 6, wholly upon the Wilbur, and the Troy, clearly complied with those rules, the latter is faultless. The Troy neither attempted to cross the bow or crowd upon the course of the Wilbur, which took all the risks of her own course, and cannot ask the Troy to share its consequences with her.

No one who ever tried an admiralty case ever found that the witnesses on moving vessels, speaking of distances in the nighttime and of moving vessels, ever got within any reliable distance of anything. The Troy, I think, was safely over to the eastward, and when Capt. Gillies, of the Troy, was called upon by the master of the Wilbur to give him more room, he answered back: "I cannot. I am as far over as I can go." The Wilbur's master then said: "Why don't you check, then?" Capt. Gillies replied: "Why don't you check yourself?" or something of that kind. Capt. Fuller responded: "I have checked." Now, as I have said, Capt. Fuller voluntarily put himself in that situation. The checking of the Troy would not have helped the Wilbur at that time. Perhaps Capt. Fuller thought there was room enough between the Troy and the Mariposa, and rightly thought so, had it not been that he unguardedly brought his steamer within the Troy's suction. That was the spring-head of this disaster. I think that at that time the Troy was nearer the distance stated by Capt. Gillies from the east bank than the witnesses for the Wilbur have put it, and I do so for these reasons: (1) Gillies was in a better position to estimate that distance than the master of the Wilbur, who admits that he could not. (2) According to the master of the Mariposa, he thought that the Wilbur was 75 feet away from him. Add to this estimate the Wilbur's beam, about 40 feet, and the distance between the Wilbur and the Troy, 35 to 40 feet, and the beam of the Troy, 45 feet, would put the Troy out about 150 or 165 feet from the Mariposa, upon the judgment of the witnesses on the part of the Mariposa and the Wilbur alone. The weight of the testimony satisfies me that the Troy was fully 250 feet away, at least, from the Mariposa, for a nearer position is irreconcilable with admitted facts. (3) The misfortune in the case was the unfortunate move by the Wilbur, which caused her to sheer off. She went off very rapidly, and when she struck the Martha she did not expend all her energy in that blow. The proofs are clear that she struck the Martha, swung around simultaneously with the blow, which was delivered at a speed of 12 or 13 miles an hour, recoiled, and swung right across stream. The Troy passed her when she had recoiled across the channel. One of the witnesses says he could have jumped aboard the Troy from the Wilbur. Another says there was a distance of 40 feet there. I don't care which it is. It would show that the Troy was considerably further to the eastward when the Wilbur moved out from the Martha simultaneously with the impact than the hurried views of the witnesses on the moving Mariposa and the Wilbur estimated. The Wilbur is 290 feet long between perpendiculars, and probably 310 or 315 feet over all. If 250 feet of her length was across or nearly across the channel—if the Troy cleared her 10 feet when the Wilbur's bow lay on the Martha, or 40 feet, as the Troy's witnesses state—the Troy was about 300 feet to eastward of midchannel at the collision. She perhaps could have gone a little further to eastward, but that her master could not know. His judgment erred on the side of the safety of his own vessel, and cannot be impeached because the event showed he might have gone further. *The Star of Hope*, 9 Wall. 230, 19 L. Ed. 638; *The City of Antwerp* and *The Friederick*, L. R. 2 P. C. 25. Especially is this true in the sudden emergency created by the Wilbur's too close approach. It is incumbent upon the Wilbur to show that she was brought into contact with the Martha through no fault of her own. She is *prima facie* the wrongdoer. I don't think she has met that burden. She occupies the same position in this case as did the *Santiago* in the case preceding. Through misfortune or fault or the facts of the case, she is unable to meet that burden, and should be condemned.

The last question is one of more difficulty, and that is as to the *Mariposa* and the *Martha*. The misfortune fell upon the *Martha*. I think that the weight of the testimony shows that certainly the *Martha* was not further west than the range line at the time she was struck. She was about the center of the channel, and perhaps a little to the eastward of it. I think that her changed position and heading were produced by the energy of the blow with which the *Wilbur* hit her, which slued her around at that point. The *Mariposa* was responsible for her position, and ought to share the consequences of the collision. The two vessels which are to be condemned here are the *Wilbur*, as the first wrongdoer, and the *Mariposa*, as the second. The *Troy* is dismissed from the action, with costs.

Mr. Shaw: What does your honor do with the *Martha*?

The Court: The *Martha* was helpless. I think the damages should be divided between the *Mariposa* and the *Wilbur*—the *Wilbur* being chiefly in fault: but the *Mariposa* is blameworthy for not having taken timely and sufficient action to avoid the up-coming vessels and allow them room. There would have been no accident had it not been for the sheer of the *Wilbur* and her unfortunate navigation, and there probably would not have been any accident if the *Mariposa* had put her consort in the right place. The *Mariposa* did not follow her own signal, and, although she announced that she was directing her course to starboard, she did not, and therefore I think the damages should be divided between the *Wilbur* and the *Mariposa*.

While the navigation of steam vessels at high speed when approaching other vessels, or under conditions portending possible danger, cannot be too strongly reprobated, and not infrequently is ground of condemnation of both, when one only inflicts the injury, yet in this case the active and proximate instrument of wrong was the *Wilbur*, which voluntarily took upon herself the hazard of the known danger of too close proximity to the *Troy*, which, in the judgment of her master, was running as close to the there unmarked easterly boundary of the channel as was prudent—a judgment which is not even now questioned by the master of the *Wilbur*.

The master of the *Troy* had a right to navigate his vessel in the belief that the *Wilbur* would be properly and prudently navigated, and would not attempt to pass the *Troy* without the latter's consent, and, of course, that she would not draw into dangerous proximity. This fault the *Wilbur* recklessly committed at a time when no preventive measure could have been taken by the *Troy*, and the *Wilbur* therefore has no right to call upon the *Troy* for contribution.

MEMORANDUM DECISIONS.

(130 Fed. 1021.)

BRIDGEWATER ROLLER MILLS CO. v. RECEIVERS OF BALTIMORE BUILDING & LOAN ASS'N. (Circuit Court of Appeals, Fourth Circuit. May 16, 1904.) No. 535. Appeal from the Circuit Court of the United States for the Western District of Virginia. Winfield Liggett and Roller & Martz, for appellant. T. N. Haas, for appellees. Appeal dismissed, under rule 20 (90 Fed. clxii, 31 C. C. A. clxii), on stipulation of attorneys. See 124 Fed. 718.

(130 Fed. 1021.)

GALE v. SOUTHERN BUILDING & LOAN ASS'N. (Circuit Court of Appeals, Fourth Circuit. May 2, 1904.) No. 477. Appeal from the Circuit Court of the United States for the Western District of Virginia. Scott & Staples and Cocke & Glasgow, for appellant. John H. Wright, for appellee. Dismissed, on stipulation of attorneys, under rule 20 (90 Fed. clxii, 31 C. C. A. clxii). See 117 Fed. 732.

(128 Fed. 1019.)

THE GLADESTRY. (Circuit Court of Appeals, Second Circuit. February 23, 1904.) No. 118. Appeal from the District Court of the United States for the Eastern District of New York. This cause comes here on appeal from a decree in favor of libellant for injuries received while working in a gang of stevedores discharging timber from the steamship Gladestry. J. Parker Kirilin, for appellant. Fredk. B. Bailey, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This cause is on all fours with *The Gladestry* (opinion in which is handed down herewith) 128 Fed. 591, 63 C. C. A. 198. Decree affirmed, with interest and costs.

(130 Fed. 1022.)

HANKS DENTAL ASS'N v. INTERNATIONAL TOOTH CROWN CO. (Circuit Court of Appeals, Second Circuit. June 1, 1904.) No. 83. In Error to the Circuit Court of the United States for the Southern District of New York. For opinion below, see 111 Fed. 916. Philip B. Adams and Charles K. Offield, for plaintiff in error. Walter D. Edmonds, for defendant in error. Before WALLACE and COXE, Circuit Judges.

PER CURIAM. On the 16th of May, 1904, the Supreme Court of the United States rendered a decision in which the following question, certified by us, was answered in the negative: "Was the order of the Circuit Court directing the president of the Hanks Dental Association, the defendant in that court, to appear before a master or commissioner appointed pursuant to the provisions of section 870 et seq. of the Code of Civil Procedure of the State of New York valid and authorized under the act of March 9, 1892?" As the only evidence tending to establish infringement was found in the deposition thus taken without authority of law, it follows that the judgment must be reversed, with costs, and a new trial directed.

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ABATEMENT AND REVIVAL.

§ 1. Transfer or devolution of title, right, interest, or liability.

Under the corporation laws of New Jersey (P. L. 1896, p. 295, § 53), which provide that corporations after their dissolution shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, the dissolution of a corporation does not abate an action brought by such corporation in Florida to recover damages to its estate, business, and credit by reason of an alleged wrongful attachment of its property; the cause of action being one which survives under the laws of Florida.

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§ 2. Waiver of grounds of abatement and time and manner of pleading in general.

Where a corporation plaintiff was dissolved before the action was tried, the defendant cannot proceed to trial, and, after waiting until a judgment in its favor has been reversed on a writ of error and the cause remanded for a new trial, file a plea setting up such dissolution in abatement.

—*L. Buckl & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 332..
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§ 1. Jurisdiction.

An American court of admiralty may, in its discretion, entertain jurisdiction of a suit by an alien seaman against a foreign ship to recover damages for the gross negligence or misconduct of the master, in failing to furnish libellant proper care, nursing, and medical treatment after his accidental injury while in the service of the ship; and the assumption of such jurisdiction will not be held an abuse of discretion by an appellate court, where the circumstances were such that otherwise the libellant, who was left in this country, permanently injured, and without money, would probably have been without any effective remedy.

—The Troop, 128 Fed. 856; *Kenney v. Louis*, Id. 63 C. C. A. 584

A contract by the master of a steamboat to collect and transport certain cotton seed from one port to another within a reasonable time, for freight specified, is a maritime contract, a breach of which entitles the shipper to recover damages in admiralty.

—*Florence Cotton Oil Co. v. Alabama Towboat Co.*, 128 Fed. 915.
63 C. C. A. 641

§ 2. Pleading, petitions, and motions.

Where a libel in admiralty was filed against a boat and barge for breach of a maritime contract, parties other than the intervening claimant were not entitled to file exceptions thereto.

—*Florence Cotton Oil Co. v. Alabama Towboat Co.*, 128 Fed. 915.
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§ 3. Evidence, and taking and filing proofs.

Hearsay testimony introduced on a hearing before a commissioner to determine the damages caused by collision must be treated as of no probative force, although not objected to until the filing of exceptions to the commissioner's report, and will not warrant a finding not supported by other evidence.

—*The Anson M. Bangs*, 129 Fed. 103. 63 C. C. A. 605

In the trial of an admiralty cause, where the testimony is taken before the court, all testimony offered, although objected to, should be admitted, subject to the objection for the benefit of the appellate court, unless so utterly irrelevant or immaterial that there can be no question of its inadmissibility.

—*Minnesota S. S. Co. v. Lehigh Valley Transp. Co.*, 129 Fed. 22;
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§ 1. Exclusion or expulsion.

A child born in the United States of Chinese parents, who at the time were Chinese subjects, but who had a permanent domicile and residence in the United States, and were not employed in any diplomatic or official capacity under the Chinese Emperor, became at birth a United States citizen.

—Sing Tuck v. United States, 128 Fed. 592.....63 C. C. A. 199

Where an alleged Chinese alien, apprehended in deportation proceedings, establishes a prima facie case of citizenship, he is entitled to have the legality of his detention judicially determined on habeas corpus, notwithstanding Act Cong. Aug. 18, 1894 (chapter 301, § 1, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303]), declares that the determination of the immigration officers shall be final, unless reversed on appeal to the Secretary of the Treasury.

—Sing Tuck v. United States, 128 Fed. 592.....63 C. C. A. 199

Where a witness to the citizenship of an alleged Chinese alien was not impeached or discredited, but was clear and straightforward, and no criticism was made with regard to the same by the commissioner, and the alleged alien was not requested to be sworn in his own behalf, his failure to offer himself as a witness was not a sufficient reason for ordering him deported.

—Ark Foo v. United States, 128 Fed. 697; Hoo Fong v. Same, Id.:
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Where a witness to the citizenship of a Chinese alien testified that defendant was born in the United States, but was unable to state any facts concerning the village where it was alleged defendant was born, and where the witness testified he lived for 18 years—the only event which he recalled with certainty being defendant's birth—and, in answer to a question as to his business, stated that he did "odd jobs and loaf," a finding of the commissioner rejecting his testimony, affirmed by the district judge, will be affirmed on appeal.

—Ark Foo v. United States, 128 Fed. 697; Hoo Fong v. Same, Id.:
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Where a commissioner's determination rejecting the evidence of citizenship in a proceeding for the deportation of a Chinese alien on the ground that he did not believe the testimony that the defendant was only 29 years of age was affirmed by the district judge, and there is nothing in the record to show that the commissioner's conclusion as to defendant's age was incorrect, the ruling will be affirmed.

—Ark Foo v. United States, 128 Fed. 697; Hoo Fong v. Same, Id.: Jung Man v. Same, Id. 63 C. C. A. 249

§ 2. Immigration.

The immigration laws of the United States, in so far as relates to punishment for their violation, are highly penal, and are to be strictly construed, and their provisions applied only to cases clearly within their terms and their spirit, construed as a whole.

—Moffitt v. United States, 128 Fed. 375. 63 C. C. A. 117

Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," clearly relates to immigration, and applies only to the entry into the United States of immigrants who, according to standard definitions of the term, are persons removing into the country for the purpose of permanent residence, and the penalty imposed by section 10 (26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]) on the master of a vessel for neglecting to detain on his vessel any "alien who may unlawfully come to the United States" on such vessel, or to return him to the port from which he came, must be construed in the light of such general purpose, and limited in its application to cases of alien immigrants.

—Moffitt v. United States, 128 Fed. 375. 63 C. C. A. 117

Defendant was indicted under Act March 3, 1891, c. 551, § 10, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299], for neglecting to detain on the steamship of which he was master an alien not entitled to land in the United States, by reason of which neglect the alien escaped and landed in the United States. On the trial the following facts were shown by an agreed statement: When defendant's ship was anchored off shore at a Mexican port a number of native peddlers came on board to sell their wares. When one of them came on deck to go ashore he found that the vessel had started and proceeded some distance. Defendant refused his request that he be taken back and landed, but promised to stop and leave him on the return trip, and thereupon put him at work, but without placing him on the crew list. On arriving at San Francisco an immigration officer notified defendant not to land the Mexican without permission, but the latter stated he did not wish to land, but wanted to be taken back home, and he was not confined. Just before the vessel sailed, however, he left it without the consent or knowledge of defendant or any of his officers, and had not returned when she left the port. *Held*, that such facts were not sufficient to warrant defendant's conviction, the alien not being an immigrant within the meaning and intent of the act, whom defendant was required to put in irons or keep under guard to secure his return on the vessel, and there being no evidence or claim that he did not act in good faith.

—Moffitt v. United States, 128 Fed. 375. 63 C. C. A. 117

§ 3. Naturalization.

Under the congressional authority to establish a uniform rule of naturalization, granted by section 8 of article 1 of the Constitution, the Congress may lawfully empower courts of the states to admit qualified aliens to citizenship, and the courts of the states may legally exercise this power without legislative authority or permission from the states which created them.

—Levin v. United States, 128 Fed. 826. 63 C. C. A. 476

The St. Louis Court of Appeals has common-law jurisdiction, and is empowered to admit qualified aliens to citizenship, because it has common-law jurisdiction to issue, hear, and determine writs of habeas corpus. 63 C.C.A.—44

pus, quo warranto, mandamus, and certiorari, and in the determination of actions at law it is generally governed by the principles, rules, and usages of the common law.

—Levin v. United States, 128 Fed. 826.....63 C. C. A. 476

Courts having common-law jurisdiction, within the meaning of that term in section 2163, Rev. St. [U. S. Comp. St. 1901, p. 1329], are those which have the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law, or courts which are governed by the principles, rules, and usages of the common law in the determination of some of the causes of which they have jurisdiction. The term is used to distinguish courts which have some common-law jurisdiction from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law.

It is not indispensable that a court should have all common-law jurisdiction to qualify it to naturalize aliens under this section. It is sufficient that it has some.

—Levin v. United States, 128 Fed. 826.....63 C. C. A. 476

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§ 1. Nature and form of remedy.

An appeal is a matter of right, secured by act of Congress upon compliance with the statutes relative to security and with the rules of the courts.

—Simpson v. First Nat. Bank, 129 Fed. 257; First Nat. Bank v. Simpson, Id.....63 C. C. A. 371

The allowance of a writ of error is a matter for judicial determination upon a consideration of the sufficiency of the grounds for the writ stated in the petition and assignment of errors.

—Simpson v. First Nat. Bank, 129 Fed. 257; First Nat. Bank v. Simpson, Id.....63 C. C. A. 371

The willful violation of an injunction by a party to the cause is a contempt of court, which constitutes a criminal misdemeanor, and the proceeding to punish therefor is in its nature a criminal proceeding, entirely

independent and distinct from the suit in which the injunction decree was entered, and a judgment of conviction therein is reviewable by writ of error, and not by appeal.

—Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105.....63 C. C. A. 607

§ 2. Presentation and reservation in lower court of grounds of review.

Counsel, who before the retirement of the jury requested the court to indicate which of the several specific requests to charge had been given, and which refused, which the court then refused to do, is entitled to be heard on exceptions taken to the refusal of each separate request, identified by its number, having made them as specific as the situation permitted.

—Erie R. Co. v. Littell, 128 Fed. 546.....63 C. C. A. 44

Evidence admitted without objection at the trial cannot be objected to on appeal.

—Jefferson Hotel Co. v. Warren, 128 Fed. 565.....63 C. C. A. 193

An assignment of error not supported by an exception cannot be reviewed.

—Netherlands-American Steam Nav. Co. v. Diamond, 128 Fed. 570...
63 C. C. A. 212

Where no instructions were objected to, and no exceptions reserved, an objection to the charge on the subject of exemplary damages cannot be reviewed.

—Morning Journal Ass'n v. Duke, 128 Fed. 657.....63 C. C. A. 459

§ 3. Supersedeas or stay of proceedings.

In an action to recover water rights in certain ponds, plaintiff prayed judgment that defendant be commanded to rebuild and restore the embankment and drain on the south bank of the river, opposite the property conveyed by plaintiff to the United States with a reservation of the water power. The state court rendered judgment that plaintiff was the owner of the water power created by the dam previously erected, and adjudged that defendant be perpetually restrained from drawing any water from the pond created by the dam. On appeal, it appearing that defendant, instead of the earth embankment, had constructed a series of stone piers, with openings between the same which could be closed by movable gates, and which, when closed, operated to maintain the pond, the court held that, as defendant's headgates would stop the water as effectually as would an embankment, the plaintiff was not injured by leaving the gates, and that the refusal of the injunction as prayed was a proper exercise of the trial court's discretion. *Held*, that the injunction contained in the judgment of the state court was prohibitive only, and not mandatory, and was therefore not suspended by a supersedeas bond given on appeal to the United States Supreme Court, where the judgment was affirmed.

—Green Bay & M. Canal Co. v. Norrie, 128 Fed. 896...63 C. C. A. 432

§ 4. Assignment of errors.

The reason for the rule requiring the filing of an assignment of errors before the allowance of an appeal is to give notice to opposing counsel and the appellate court of the questions of law to be discussed. In an action at law there is the additional reason that the presentation of an assignment of errors to the judge who allows or issues a writ of error is essential to his decision of the question whether or not it should be issued.

—Simpson v. First Nat. Bank, 129 Fed. 257; First Nat. Bank v. Simpson, Id.....63 C. C. A. 371

An allowance of an appeal on condition that the petitioner give a bond in a fixed amount does not become an allowance of the appeal until the bond is given and accepted, and the filing of an assignment of errors before or at the time of the giving and acceptance of the bond is a filing within the time prescribed by the rule.

—Simpson v. First Nat. Bank, 129 Fed. 257; First Nat. Bank v. Simpson, Id.....63 C. C. A. 371

The filing of an assignment of errors before or at the time of the allowance of an appeal is indispensable, under the eleventh rule of the Circuit Courts of Appeals (91 Fed. vi, 32 C. C. A. lxxxviii), and the appeal will be dismissed if the assignment is not thus filed.

—Simpson v. First Nat. Bank, 129 Fed. 257; First Nat. Bank v. Simpson, Id. 63 C. C. A. 371

§ 5. Review.

Where the trial court affirmed findings of a master on an accounting of rents, such finding will not be reversed on appeal, unless a plain mistake is definitely pointed out.

—Buckingham v. Estes, 128 Fed. 584. 63 C. C. A. 20

An order of a Circuit Court overruling exceptions to the report of a master for the reason that the record was not printed as required by the rules was within its discretion, and is not reviewable on appeal.

—Du Bois v. City of New York, 128 Fed. 418. 63 C. C. A. 160

The admission of a deposition in evidence for all purposes, if error, was harmless where it ought not to have changed the result.

—Snowden v. Loree, 128 Fed. 419. 63 C. C. A. 161

Where an action was tried before the District Judge, who saw all the witnesses, his findings of fact will be followed on appeal.

—The Gladestry, 128 Fed. 591. 63 C. C. A. 198

A finding of fact by the trial court based on conflicting evidence will not be reversed on appeal where it is not clearly erroneous.

—Lopez v. Collier, 129 Fed. 104. 63 C. C. A. 606

ARBITRATION AND AWARD.

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ARMY AND NAVY.

Court-Martial Manual 1895, promulgated by the Secretary of War, and directing in a footnote: "Unless the laws of the state, territory, etc., in which the court-martial is convened, are at hand, it is impossible for the court to determine in all cases whether or not, under the ninety-seventh article of war, the offender is punishable by a penitentiary confinement. Therefore, in case of any doubt, the words 'in such place as the reviewing authority may direct' will be used in the sentence"—which direction was repeated in like manuals issued by the Secretary of War in 1898 and 1901, operated to qualify Army Regulations, § 940, before named.

—In re Brodie, 128 Fed. 665; In re Coffey, Id.; In re Hanshaw, Id.; In re Morris, Id. 63 C. C. A. 419

A footnote to a rule or regulation is not less authoritative than the principal text, where the language of the footnote and the general character of the principal text point to a single authorship, and an intention that the footnote shall command respect and obedience in like manner as the body of the rule or regulation.

—In re Brodie, 128 Fed. 665; In re Coffey, Id.; In re Hanshaw, Id.; In re Morris, Id. 63 C. C. A. 419

Army Regulations, par. 940, providing that, when the sentence of a court-martial prescribes imprisonment, the court shall state therein whether the prisoner shall be confined in a penitentiary or at a post, being guided in its determination by the ninety-seventh article of war (Rev. St. p. 239 [U. S. Comp. St. 1901, p. 967]), is not a statute, but a rule or regulation promulgated by the Secretary of War under authority of the president, and therefore subject to modification by the same authority.

—In re Brodie, 128 Fed. 665; In re Coffey, Id.; In re Hanshaw, Id.; In re Morris, Id. 63 C. C. A. 419

Where an order of the Secretary of War promulgating army regulations stated that they were published by the direction of the President for the "government" of all concerned, and an order promulgating the manual for courts-martial, made no reference to the president, but stated that the manual was published for the "information and guidance" of all concerned, in legal contemplation the two orders spoke by the same authority, and were of equal dignity.

—In re Brodie, 128 Fed. 665; In re Coffey, Id.; In re Hanshew, Id.;
In re Morris, Id. 63 C. C. A. 419

Rules and orders promulgated by the Secretary of War for the government of the army are presumed to be issued by the Secretary with the approbation and under the direction of the President, as commander in chief, though they do not expressly so state.

—In re Brodie, 128 Fed. 665; In re Coffey, Id.; In re Hanshew, Id.;
In re Morris, Id. 63 C. C. A. 419

Whether, within the meaning of Army Regulations, § 940, as qualified by the footnote in the court-martial manual before named, the local law is impossible of ascertainment by the court-martial, is a question for that court to determine, and, where the form of the sentence resolves that question in the affirmative, such sentence is conclusive upon that matter and not open to collateral attack.

—In re Brodie, 128 Fed. 665; In re Coffey, Id.; In re Hanshew, Id.;
In re Morris, Id. 63 C. C. A. 419

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ATTORNEY AND CLIENT.

§ 1. Compensation and lien of attorney.

Suits having been brought by lien creditors against a corporation, and a receiver having been appointed, petitioners, as attorneys for a minority stockholder, filed a bill on his behalf, and on behalf of all others similarly situated who should come in and become parties and share in the expense of the proceedings, alleging that the former suits had been brought in bad faith, etc. The bill contained a prayer for the appointment of a receiver to operate the property, pay the debts, and thereafter to turn over to the stockholders the property remaining. A co-receiver was appointed on such petition, the suits consolidated, and after trial, in which the allegations of fraud of the minority stockholder's bill were not proved, the court ordered a sale of the property for the payment of debts. A sale was had, and, on petitioners' application, was set aside for inadequacy of price, and another sale ordered, and an upset price fixed, which was \$40,000 higher than the amount bid at the previous sale, and the property was subsequently sold to the lien creditors for such sum, which was insufficient to pay the liens. *Held*, that the petitioners were not entitled to attorney's fees, payable out of the proceeds of such sale.

—*Lamar v. Hall & Wimberly*, 129 Fed. 79.....63 C. C. A. 521

One jointly interested with others in trust funds, who in good faith maintains for himself and others interested like him necessary litigation to secure or protect them, is entitled to reimbursement out of the fund protected or secured. The principle on which such allowance is based is that the plaintiff represented the others for whom he sued. But a solicitor cannot make another person his debtor by rendering services in his behalf without his express or implied assent.

—*Lamar v. Hall & Wimberly*, 129 Fed. 79.....63 C. C. A. 521

BAILMENT.

See "Innkeepers."

A bailee for hire of services may maintain an action of trespass, trover, or conversion for the disturbance of his possession by a wrongdoer, and may recover the value of the property as damages.

—*National Surety Co. v. United States*, 129 Fed. 70...63 C. C. A. 512

BANKRUPTCY.

§ 1. Petition, adjudication, warrant, and custody of property.

Bankr. Law, § 4, cl. "a," Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that any person owing debts, except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt, and clause "b," providing that any natural person, except a wage-earner and certain others, owing debts to the amount of a thousand dollars or over, may be adjudged an involuntary bankrupt, authorizes the adjudication of a married woman as an involuntary bankrupt, where she

was engaged in business on her own account, and owed business obligations of the amount required by the statute, for which her separate property was liable in equity.

—MacDonald v. Tefft-Weller Co., 128 Fed. 381.....63 C. C. A. 123

Bankr. Act, § 3, subsec. 2 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), provides that the transfer by a debtor, while insolvent, of any portion of his property to some of his creditors, with intent to prefer them over others, shall constitute an act of bankruptcy; and the term "insolvency" is defined by section 1, cl. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419] as the condition of a person whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. *Held*, that the "property conveyed," as used in such provisions, in so far as it related to a mortgage of a corporation's entire property, did not include the mortgagor's remaining estate, where, as in Michigan, the mortgage does not transfer the title, but creates a lien only, and hence, where such estate was greater in value than the mortgagor's unsecured debts, the execution of the mortgage did not constitute an act of bankruptcy.

—Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son, 128 Fed. 701.....63 C. C. A. 253

Bankr. Act, § 3, subsec. 1 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), makes the execution of those conveyances which by the common law and the statute of Elizabeth were held void, as tending to hinder, delay, or defraud creditors, a ground for adjudicating the grantor a bankrupt; and subsection 3 relieves such grantor from the consequences of subsection 1 if he can prove that at the date of filing the petition he was solvent. *Held*, that the test as to whether a conveyance by an alleged bankrupt was fraudulent, within subsection 1, is the bona fides of the transfer, and hence it was error for the court to assume that, because a mortgage executed by the alleged bankrupt covered the whole of its property, it was necessarily within such section, and to refuse to admit evidence of the good faith of the transfer.

—Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son, 128 Fed. 701.....63 C. C. A. 253

Issue having been joined in a petition in involuntary bankruptcy against a partnership, and a jury trial waived, defendants subsequently filed an amended answer admitting insolvency, but not admitting the commission of the acts of bankruptcy charged, and praying that they be adjudged bankrupts on certain conditions. The district judge refused to act upon such answer, and certified the cause to the Circuit Court, which permitted the withdrawal of the amended answer, and submitted the issue joined by the original answer to the jury, which returned a verdict for defendants. The result having been reported back to the District Court, the judge therein adopted the verdict and dismissed the petition. *Held*, that the action taken was not under section 19 of the Bankruptcy Act, (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), but was within the discretion of the court—the verdict being taken as advisory, merely—and that, where it appeared that the matter was fairly tried upon its merits, the order of dismissal would not be reversed on appeal because of informality in the procedure.

—Oil Well Supply Co. v. Hall, 128 Fed. 875.....63 C. C. A. 343

A conveyance of property by a debtor to creditors cannot be charged as an act of bankruptcy, where he had at the time no other creditors.

—Brake v. Callison, 129 Fed. 201.....63 C. C. A. 359

A judgment creditor cannot maintain a petition in bankruptcy against his debtor on an allegation that the latter made a conveyance of property to creditors which constituted an act of bankruptcy before the rendition of the judgment, where it does not appear that the demand on which it

was rendered was one provable in bankruptcy, so as to make him a creditor at the time the conveyance was made.

—*Brake v. Callison*, 129 Fed. 201.....63 C. C. A. 350

§ 2. Assignment, administration, and distribution of bankrupt's estate.

A bankrupt is not an indispensable party to a suit by his wife against his trustee in bankruptcy to enforce a resulting trust of real estate scheduled as a part of the bankrupt's assets.

—*Buckingham v. Estes*, 128 Fed. 584.....63 C. C. A. 20

Where suit was brought by a married woman against her husband and his trustee in bankruptcy to enforce a resulting trust of certain land standing in his name, an objection that a judgment in her favor was erroneous because she, being a married woman, had no power to sue without the intervention of a trustee or next friend, and that no decree pro confesso was taken against her husband on his failure to answer, could not be made for the first time on appeal.

—*Buckingham v. Estes*, 128 Fed. 584.....63 C. C. A. 20

Where, in an action by a bankrupt's wife to enforce a resulting trust of land assigned as a part of the bankrupt's assets, the court rendered a decree in plaintiff's favor and adjudged her entitled to rents, and thereafter referred the matter to the master, only to determine the amount of such rents, an appeal from a decree confirming the master's report settling the amount of the rents did not authorize a review of the wife's right to recover any rents under the facts.

—*Buckingham v. Estes*, 128 Fed. 584.....63 C. C. A. 20

Where, on appeal from an order confirming a master's report as to the amount of rents a bankrupt's wife was entitled to under a decree enforcing a resulting trust of land held by the bankrupt, none of the errors assigned raised any question as to the correctness of the decree in favor of the wife for rents and profits, but all of them related to the question of amount, the wife's right to recover rents could not be reviewed.

—*Buckingham v. Estes*, 128 Fed. 584.....63 C. C. A. 20

Where a bankrupt's wife brought suit against the bankrupt and his trustee to enforce an alleged resulting trust concerning lands transferred as a part of the bankrupt's assets within a year after the adjudication of bankruptcy, in which she subsequently recovered a decree, the claim was sufficiently "proven," within Bankr. Act, §§ 57, 57n (Act July 1, 1898, c. 541, 30 Stat. 560, 561 [U. S. Comp. St. 1901, pp. 3443, 3444]), requiring claims to be proved within a year, and authorizing amendment of the claim after a year has elapsed.

—*Buckingham v. Estes*, 128 Fed. 584.....63 C. C. A. 20

Since the separate property of a married woman residing in Florida, under the laws of that state, is liable in equity for her business obligations, where she is engaged in business on her own account, though not a free trader, such obligations constitute debts, within Bankr. Law, § 1, Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], defining the term "debt" to include any debt, demand, or claim provable in bankruptcy, and section 63 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]), declaring that debts of a bankrupt may be proved and allowed against his estate which are founded on an open account, or on a contract, express or implied.

—*MacDonald v. Tefft-Weller Co.*, 128 Fed. 381.....63 C. C. A. 123

Where a chattel mortgagee of a bankrupt, prior to his bankruptcy, but after he had made a general assignment, accepted a part of the mortgaged property in full satisfaction of his debt, his lien on the remainder is extinguished, and he cannot thereafter transfer it to one of the other creditors to the exclusion of others.

—*In re Thompson*, 128 Fed. 575; *In re Murray*, Id....63 C. C. A. 217

A court of bankruptcy has jurisdiction to require an accounting from an assignee for creditors of a bankrupt, under an assignment which con-

stituted an act of bankruptcy; and where he appears and submits his account, and enters upon a hearing without objection, the court does not lose jurisdiction to require him to turn over the property to the trustee because he asserts title to a part of such property in himself.

—In re Thompson, 128 Fed. 575; In re Murray, Id....63 C. C. A. 217

While a court of bankruptcy has power to reopen the estate of a bankrupt to permit the trustee to maintain an action to recover concealed assets, the granting of an application therefor rests in its discretion, and its action will not be reversed except for an abuse of discretion.

—In re Goldman, 129 Fed. 212; In re Gilbert, Id.....63 C. C. A. 370

§ 3. Appeal and revision of proceedings.

Where, on appeal from an order allowing a claim against a bankrupt's estate, the transcript failed to disclose the date of the adjudication, an objection that the allowance was erroneous because the claim was not proved within one year after the adjudication, as required by Bankr. Act, § 57n (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), was unavailable.

—Buckingham v. Estes, 128 Fed. 584.....63 C. C. A. 20

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 2.

BILLS OF LADING.

See "Shipping," § 2.

BONA FIDE PURCHASERS.

Of goods, see "Sales," § 3.

Of lands, see "Vendor and Purchaser," § 2.

BONDS.

Bonds to prevent or discharge mechanic's lien, see "Mechanics' Liens," § 1.

Enactment and validity of statutes authorizing issue by counties, see "Statutes," § 1.

Guaranteed by railroad company, see "Railroads," § 2.

Municipal bonds, see "Municipal Corporations," § 1.

Of contractors with United States, see "United States," § 1.

Of counties, see "Counties," § 1.

Of letter carriers, see "Post Office," § 1.

BREACH.

Of condition, see "Insurance," § 3.

Of contract, see "Sales," § 2.

Of warranty, see "Sales," § 5.

BROKERS.

Customs, see "Customs and Usages."

Performance of contracts of sale by or to, see "Sales," § 2.

Requisites and validity of sales by, see "Sales," § 1.

§ 1. **Duties and liabilities to principal.**

In an action for breach of a contract of sale, the entire correspondence between defendants and the sellers showed that both parties understood that defendants were middlemen, who had regular customers for whom they sold goods like those in question, and other regular customers for whom they bought. *Held*, that there was no impropriety in such double agency.

—*Lincoln v. Levi Cotton Mills Co.*, 128 Fed. 865.....63 C. C. A. 332

§ 2. **Rights, powers, and liabilities as to third persons.**

Where defendants sold certain yarn for plaintiff, and, on demand, refused or neglected to disclose the name of the buyer after deliveries had been refused, defendants thereby became personally liable on the contract.

—*Lincoln v. Levi Cotton Mills Co.*, 128 Fed. 865.....63 C. C. A. 332

BUILDING CONTRACTS.

See "Mechanics' Liens," § 1.

CANCELLATION OF INSTRUMENTS.

§ 1. **Right of action and defenses.**

Before a loss under a policy of insurance, the company which issued it has no adequate remedy at law for fraud, false representations, or concealments which procured its issue, and a federal court has jurisdiction in equity of a suit for the surrender and cancellation of the policy.

—*Riggs v. Union Life Ins. Co.*, 129 Fed. 207; *Same v. American Cent. Life Ins. Co.*, *Id.*; *Same v. Fidelity Mut. Life Ins. Co.*, *Id.*; *Same v. Northwestern Nat. Life Ins. Co.*, *Id.*; *Same v. Hartford Life Ins. Co.*, *Id.*.....63 C. C. A. 35

The fact that the action at law on the policy will be brought in a state court does not render the remedy of the company at law in the federal court so inadequate that a suit in equity to avoid the policy, commenced after the loss, may be maintained, where the company has the right to remove the action at law from the state to the federal court.

—*Riggs v. Union Life Ins. Co.*, 129 Fed. 207; *Same v. American Cent. Life Ins. Co.*, *Id.*; *Same v. Fidelity Mut. Life Ins. Co.*, *Id.*; *Same v. Northwestern Nat. Life Ins. Co.*, *Id.*; *Same v. Hartford Life Ins. Co.*, *Id.*.....63 C. C. A. 35

Nor does the fact that the license of the company to do business in the state in which the action at law is to be commenced will be revoked if the company removes that action to a federal court render its remedy at law in the federal court so inadequate as to give that court jurisdiction in equity of a suit to cancel the policy.

—*Riggs v. Union Life Ins. Co.*, 129 Fed. 207; *Same v. American Cent. Life Ins. Co.*, *Id.*; *Same v. Fidelity Mut. Life Ins. Co.*, *Id.*; *Same v. Northwestern Nat. Life Ins. Co.*, *Id.*; *Same v. Hartford Life Ins. Co.*, *Id.*.....63 C. C. A. 35

After a loss under a policy of insurance, the company which issued it ordinarily has an adequate remedy at law for fraud, false representations, or false concealments which procured its issue by presenting them as a defense to any action that may be brought upon the policy, so that a suit in equity for its surrender and cancellation, commenced after the loss, cannot be maintained in the federal courts in the absence of special facts or circumstances invoking jurisdiction in equity.

—*Riggs v. Union Life Ins. Co.*, 129 Fed. 207; *Same v. American Cent. Life Ins. Co.*, *Id.*; *Same v. Fidelity Mut. Life Ins. Co.*, *Id.*; *Same v. Northwestern Nat. Life Ins. Co.*, *Id.*; *Same v. Hartford Life Ins. Co.*, *Id.*.....63 C. C. A. 35

§ 2. Proceedings and relief.

Evidence considered, and *held* insufficient to warrant the cancellation of a deed conveying an undivided interest in a tract of land for fraud, under the rule that in such cases the proof of fraud must be clear, satisfactory, and convincing, where complainants admitted their signatures to the deed, which was formally executed and acknowledged, duly recorded, and remained unchallenged for more than four years, during all of which time the conduct of the parties was consistent with a joint ownership of the land, and in some respects inconsistent with its sole ownership by complainants.

—*Treat v. Russell*, 128 Fed. 847.....63 C. C. A. 575

CAPITAL.

Of corporations in general, see "Corporations," § 1.

CARGO.

See "Shipping."

CARRIERS.

Carriage of goods by vessels, see "Shipping," § 2.

Carriage of passengers by vessels, see "Shipping," § 3.

Insurable interest of carrier in goods shipped, see "Insurance," § 1.

Regulation of street railroads as to allowing passengers to enter trains at stations, see "Street Railroads," § 1.

§ 1. Carriage of passengers.

A railroad company is bound to exercise only such degree of care in the construction of its stations and platforms as is sufficient to protect passengers using ordinary care from injury.

—*Lauterer v. Manhattan Ry. Co.*, 128 Fed. 540.....63 C. C. A. 38

Where plaintiff's intestate attempted to board a car on an elevated road at a station after the gate had been closed and the car was moving, and after being carried beyond the station platform fell and was killed, the absence of a railing or guard across the end of the platform cannot be considered a proximate cause of the accident, and evidence as to the construction of the platform was properly excluded, in an action to recover for the death.

—*Lauterer v. Manhattan Ry. Co.*, 128 Fed. 540.....63 C. C. A. 38

One who voluntarily and unnecessarily exposes himself to a known danger, by attempting to climb on board a moving car, assumes all risks of injury therefrom; and the railroad company is not chargeable with negligence, causing his injury, which results from his falling from the car because of the manner in which its station or platform is constructed.

—*Lauterer v. Manhattan Ry. Co.*, 128 Fed. 540.....63 C. C. A. 38

When a passenger has purchased a ticket from a railroad company, purporting to entitle him to passage to a particular place, and has undertaken his journey therefor, and there is nothing on the face of the ticket, and no prior knowledge or notice of rules of the company, which would make such ticket invalid, brought home to the purchaser, he is rightfully a passenger on the train, and the company is liable in an action to recover damages for his ejection.

—*Erie R. Co. v. Littell*, 128 Fed. 546.....63 C. C. A. 44

A passenger who is rightfully on a railroad train has a right to refuse to be ejected from it, and to make sufficient resistance to denote that he is being removed by compulsion and against his will.

—*Erie R. Co. v. Littell*, 128 Fed. 546.....63 C. C. A. 44

Where a train stopped for a passenger to alight, and when he was in the act of doing so, and without allowing a reasonable time for that purpose, it was suddenly started with a jerk, whereby he was thrown from the car and injured, he was entitled to recover therefor.

—Rutledge v. New Orleans & N. E. R. Co., 129 Fed. 94.63 C. C. A. 596

In an action for injuries to a passenger while attempting to alight, there being conflict in the evidence on the issue as to his alleged contributory negligence in stepping off the train while it was moving, it presents a question for the jury.

—Rutledge v. New Orleans & N. E. R. Co., 129 Fed. 94.63 C. C. A. 596

CERTIFICATE.

Patent certificate for public lands, see "Public Lands," § 2.

CHALLENGE.

To juror, see "Jury," § 1.

CHANCERY.

See "Equity."

CHARGE.

To jury in civil actions, see "Trial," § 2.

To jury in criminal prosecutions, see "Criminal Law," § 3.

CHATTEL MORTGAGES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

Federal courts following state decisions as to validity, see "Courts," § 3.

§ 1. Rights and remedies of creditors.

Where a chattel mortgage on a bankrupt's stock of goods authorized the mortgagor to continue in possession and sell the goods, but required that he should deposit to the mortgagee's bank account each day the receipts for sales over the amount of the running expenses of the store, to be applied on the debt, and that, if he failed so to do, the trustee named in the mortgage should at once take possession and sell the stock at public auction, such mortgage was not fraudulent on its face.

—Dugan v. Beckett, 129 Fed. 56.....63 C. C. A. 496

CHINESE.

Exclusion or expulsion, see "Aliens," § 1.

CIRCUIT COURTS OF APPEALS.

See "Courts," § 3.

CITIZENS.

See "Aliens"; "Indians."

Citizenship ground of jurisdiction of United States courts, see "Courts," § 3.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 2.
Of patent, see "Patents," § 4.

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 5.

COLLISION.

§ 1. Rules and precautions for preventing collisions in general.

Where the fault of one vessel is palpable and adequate to account for a collision, she cannot impugn the management of another vessel, except on clear proof of contributory fault.

—American S. S. Co. v. American Steel Barge Co., 129 Fed. 65.....
63 C. C. A. 507

§ 2. Steam vessels and sail vessels.

A collision occurred at sea in the night between a steamer and a schooner on crossing courses. The night was clear and the wind light, but it was shown that the schooner had steerageway, and that her lights were burning and of more than usual size. While the evidence as to her course was conflicting as between the witnesses from the two vessels, it did not sustain the contention of the steamer that she was on such a course that her lights could not be seen in time to have prevented the collision, although the steamer's lookout and three of her officers testified that they were watching, and did not see the lights until immediately before the collision. *Held* that, under such evidence, the steamer, as the burdened vessel, must be held solely in fault.

—The Helen G. Moseley, 128 Fed. 402; *Moseley v. Rob. M. Sloman & Co., Id.*.....63 C. C. A. 144

A tug *held* solely in fault for a collision with a schooner on a crossing course for persisting in her course, on the theory that the schooner would not run out her tack, which she was privileged to do, with the duty resting on the tug to keep out of her way.

—The Anson M. Bangs, 129 Fed. 103.....63 C. C. A. 605

§ 3. Vessels in tow.

As a steamer with two barges in tow, each on a line about 500 feet long, was passing up the Detroit river in the daytime, about 800 feet from the Canadian side, and when she was about opposite a dock on that side, the steamer Minch, which had been coaling there, swung out and started slowly across the river, her head diagonally upstream. She continued to move slowly until she struck the rear barge about amidships. When she was some 200 feet ahead of the barge, and 50 to 75 feet on her starboard side, the helm of the barge was starboarded 1 or 1½ points; and immediately before the collision, and when it was inevitable, the helm was put hard aport to lessen the blow. *Held*, that the collision was due to the gross fault of the Minch, and that the barge could not be charged with contributory fault because she did not put her helm hard astarboard, since she had the right to expect the steamer to keep off to a safe distance, and for the further reason that there was a vessel with a tow passing down on the other side, and there was danger that the current might take her into them.

—The Phillip Minch, 128 Fed. 578.....63 C. C. A. 14

A finding by the District Court affirmed that a ferryboat crossing North river in the evening was solely in fault for a collision with a steamship coming up the river in tow and disabled, on the ground that owing to the

insufficiency of the ferryboat's lookout she failed to see the lights of the steamship until shortly before collision, and to keep out of the way, as she was bound to do after receiving an alarm signal from the tug.

—The *Bergen*, 128 Fed. 920; *The Robert Haddon*, Id.: *The Ranza*, Id. 63 C. C. A. 646

§ 4. Narrow channels, harbors, rivers, and canals.

The *Crescent City*, a large lake steamer, laden with iron ore, when coming down the St. Clair river, at night, overtook and attempted to pass the steamer *Trevor*, with two barges in tow tandem, each on a line 750 feet long, just as they were passing round the Southeast Bend. At the same time the *Maricopa*, with the large barge *Manila* in tow, both in water ballast, was passing up. The meeting vessels were within sight of each other's lights when the *Crescent City* started to pass the overtaken tow, and soon thereafter passing signals were exchanged, and in pursuance thereof the descending steamer and tow kept toward the western side of the channel, while the *Maricopa* and tow were as close as possible to the eastern bank. As the *Maricopa* was rounding the bend she was passed by the *Crescent City*, which then took a straight course, making toward the Canadian or eastern shore, and kept it without checking her speed of about 12 miles by the land until she collided with the *Manila*, then sheered off, and struck the towline behind the *Trevor*, throwing her across the channel, where she was struck by the first tow before she could get out of the way. There was a distance of about 200 feet between the ascending and descending tows. The *Trevor* was going at a speed of $9\frac{1}{2}$ miles by the land, and the *Maricopa* of 8 miles. There was a wind from the southeast, which tended to drift the *Manila* toward the center of the channel. *Held*, that the *Crescent City* was clearly in fault, both because of her excessive speed while trying to pass between the two tows at such a place, and for the course she took after passing the *Maricopa*, directed toward the course of the *Manila*; that neither of the other vessels was in fault, the speed of the *Maricopa* apparently being necessary to prevent the *Manila* from drifting, and it appearing that the latter was following her steamer, and did all that was possible to avoid the collision.

—*American S. S. Co. v. American Steel Barge Co.*, 129 Fed. 65. 63 C. C. A. 507

The steamer *Mariposa*, with the barge *Martha* in tow on a line 900 feet long, both heavily laden with iron ore, was coming down the dredged channel through Lake St. Clair in the evening at a speed of about 7 miles: the channel being 800 feet wide. When near the south end of the cut signals for passing port to port were exchanged between the *Mariposa* and the steamers *Troy* and *Wilbur*, which were coming up lightly laden, and were then just below the bend at the entrance to the channel, and about three-fourths of a mile away. The two steamers came on abreast, the *Troy* on the starboard side, and the *Wilbur* about 40 feet away, at a speed of 13 miles or more, and passed the *Mariposa* safely, but about that time the *Wilbur* took a sudden sheer to port, and struck and sunk the *Martha*. The weight of testimony tended to show that when the signals were exchanged the *Mariposa* was about on the range line in the middle of the channel; that she then ported, and, on seeing that the two meeting steamers were abreast, ported again, the *Martha* following each time, and that at the time of collision they were each about 150 feet to the westward of the center of the channel; also that the *Wilbur* passed the *Mariposa* at a distance of about 50 feet, and was at no time east of the range line. She called to the *Troy* to stand off and give more room, which being refused, she slackened speed just before meeting the *Mariposa*, which brought her stern within the suction at the stern of the *Troy*, and caused the sheer. *Held*, that neither the *Mariposa* nor the *Martha* was in fault, it appearing that the latter ported again on seeing the *Wilbur* sheer, but could not then get out of the way, but that the collision was due to the fault of the *Wilbur* and the *Troy*, for coming up abreast, as they did. so

near the center of the channel; the Troy also being in fault for unnecessarily crowding the Wilbur toward the meeting vessels.

—Minnesota S. S. Co. v. Lehigh Valley Transp. Co., 129 Fed. 22;
Lehigh Valley Transp. Co. v. Minnesota S. S. Co., Id.
63 C. C. A. 672

§ 5. Suits for damages.

It is not enough, when the negligence of one vessel is great, to condemn the other to a division of damages, that the question is a close one as to whether she might not have done something she did not do to avoid the consequences of the other's negligence; but the evidence that the situation required her to do more than she did must be clear and convincing, since all questions of doubt are to be resolved in her favor.

—The Phillip Minch, 128 Fed. 578. 63 C. C. A. 14

Where the testimony of the crew of a schooner as to her course before and at the time of a collision, and as to the bearing of the light of an approaching steamer with which the collision occurred, cannot be correct in both particulars, or the collision could not have occurred, assuming the witnesses to be honest, the testimony as to the course is entitled to preference, as less liable to error.

—The Helen G. Moseley, 128 Fed. 402; Moseley v. Rob. M. Sloman & Co., Id. 63 C. C. A. 144

An award of damages for collision on the report of a commissioner considered and approved.

—The Bergen, 128 Fed. 920; The Robert Haddon, Id.; The Ranza, Id. 63 C. C. A. 646

A vessel which suddenly sheers from her proper course in ordinary weather, in a fairly ample space for navigation, and under no apparent stress of circumstances occurring without her fault, and, in consequence of such sheering, comes into collision with another vessel, is presumptively in fault for the collision, and has the burden of exonerating herself.

—Minnesota S. S. Co. v. Lehigh Valley Transp. Co., 129 Fed. 22;
Lehigh Valley Transp. Co. v. Minnesota S. S. Co., Id.
63 C. C. A. 672

COMBINATIONS.

See "Conspiracy."

COMITY.

Between courts, see "Courts," § 4.

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

COMMON CARRIERS.

See "Carriers."

COMPENSATION.

For improvements, see "Improvements."

Of attorney, see "Attorney and Client," § 1.

Salvage, see "Salvage," § 1.

COMPETENCY.

Of evidence, see "Criminal Law," § 2.

COMPROMISE AND SETTLEMENT.

See "Release."

CONCLUSION.

Of witness, see "Evidence," § 6.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 4.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In deeds, see "Deeds," § 1.

In insurance policy, see "Insurance," § 3.

CONFLICT OF LAWS.

As to marine insurance, see "Insurance," § 2.

Conflicting jurisdiction of courts, see "Courts," § 4.

CONSPIRACY.

Admissions by conspirators, see "Evidence," § 3.

§ 1. Criminal responsibility.

In a prosecution for conspiracy to defraud the United States by the execution of straw bail, it was not necessary that the government should prove that the accused did not appear on the day required, since the government was defrauded when the accused were released on the strength of a recognizance, apparently good, but worthless in fact.

—Radford v. United States, 129 Fed. 49.....63 C. C. A. 491

CONSTITUTIONAL LAW.

Enactment and validity of statutes, see "Statutes," § 1.

§ 1. Construction, operation, and enforcement of constitutional provisions.

The contemporaneous construction of a provision of the Constitution by those who framed it, the concurrence of statesmen, legislators, and judges in that construction, and the acquiescence and uninterrupted practice of all the departments of the government in the same interpretation for more than 100 years, conclusively determine the meaning and effect of the provision, and place it beyond the realm of doubt or debate.

—Levin v. United States, 128 Fed. 826.....63 C. C. A. 476

CONTEMPT.

§ 1. Power to punish and proceedings therefor.

A bill in equity, filed in aid of an action at law to recover for trespasses on a mining claim, alleged that defendants had extended their underground workings from adjoining claims owned by them into the claim of com-

plainant, and prayed for an injunction restraining them from extracting and removing ore therefrom. The answer justified the trespasses on the ground that the veins or lodes into which defendants' workings were extended had their apexes in defendants' claims, and were their property. A preliminary injunction was granted, and, on petition of complainant, an order was entered requiring defendants to permit agents of complainant to enter their workings, and examine, inspect, and survey the same so far as necessary to obtain evidence on the issue joined. Defendants having refused to permit such inspection and survey, an order was entered finding them in contempt of court, and adjudging a fine against them; such order, however, to be discharged, as to both fine and commitment, on their compliance with the previous order. *Held*, that such order of contempt was not a judgment in a criminal, but in a civil, proceeding; that it was remedial and coercive in character, and entered for the purpose of enforcing private rights of complainant, judicially determined, and was not reviewable by writ of error.

—*Heinze v. Butte & B. Consol. Min. Co.*, 129 Fed. 274. 63 C. C. A. 388

CONTRACTS.

Admiralty jurisdiction, see "Admiralty," § 1.
 Agreements within statute of frauds, see "Frauds, Statute of."
 Cancellation, see "Cancellation of Instruments."
 Operation and effect of customs or usages, see "Customs and Usages."
 Parol or extrinsic evidence, see "Evidence," § 5.
 Specific performance, see "Specific Performance."

Contracts of particular classes of parties.

See "Master and Servant"; "Pilots"; "United States," § 1.

Contracts relating to particular subjects.

See "Mines and Minerals," § 1; "Public Lands," § 2; "Towage."

Particular classes of express contracts.

See "Bailment"; "Covenants"; "Insurance"; "Partnership."
 Affreightment, see "Shipping," § 2.
 Bills of lading, see "Shipping," § 2.
 Employment, see "Master and Servant."
 For sale of personal property, see "Sales."
 For sale of realty, see "Vendor and Purchaser."
 Leases, see "Landlord and Tenant."
 Mutual benefit insurance, see "Insurance," § 6.

Particular modes of discharging contracts.

See "Release."

CONTRIBUTORY NEGLIGENCE.

See "Negligence," §§ 1, 2.
 Of passenger, see "Carriers," § 1.
 Of servant, see "Master and Servant," § 1.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

Conveyances of particular species of property.

See "Patents," § 2; "Public Lands," § 2.

Particular classes of conveyances.

See "Chattel Mortgages"; "Deeds."

63 C.C.A.—45

CORPORATIONS.

See "Municipal Corporations," § 1.

Dissolution of corporation as ground for abatement of action, see "Abatement and Revival."

Foreign judgments in actions by or against, see "Judgment," § 3.

Gift of stock, see "Gifts," § 1.

Railroad companies, see "Railroads," § 1.

Receivers in general, see "Receivers," § 1.

Residence ground for jurisdiction, see "Courts," § 3.

§ 1. **Capital, stock, and dividends.**

A stockholder is not liable to creditors of the corporation for dividends received by him in good faith while the corporation was a going concern and solvent.

—Great Western Min. & Mfg. Co. v. Harris, 128 Fed. 321.....
63 C. C. A. 51

The certificates of indebtedness having been issued under express statutory authority conferred by Laws Wis. 1895, p. 475, c. 244, § 11, the conversion, even if not originally authorized, was subsequently confirmed by Laws Wis. 1897, p. 632, c. 294, and Laws Wis. 1899, p. 296, c. 193, authorizing the consolidation of railroad companies, validating agreements on which their stocks had been issued, together with their plans of reorganization, etc.

—Weidenfeld v. Northern Pac. Ry. Co., 129 Fed. 305..63 C. C. A. 537

Where a corporation issued certificates of indebtedness with which to retire its preferred stock, and immediately thereafter converted such certificates into common stock, such transaction should be considered as a whole, and hence the issuance of the certificates and retirement of the preferred stock did not operate as a reduction of capital, nor the issuance of such additional common stock as an increase thereof.

—Weidenfeld v. Northern Pac. Ry. Co., 129 Fed. 305..63 C. C. A. 537

Laws Wis. 1895, c. 244, p. 475, chartered the Northern Pacific Railway Company, and authorized it to classify its stock into common and preferred, and to make such preferred stock convertible into common, on such terms and conditions as might be fixed by the board of directors. The act also authorized the company to borrow from time to time such sums of money and on such terms as the corporation or its board of directors should agree, and in its corporate name to execute evidences of indebtedness, and make the same convertible into its capital stock of any class upon such terms and conditions as its board of directors deemed advisable. *Held*, that the corporation, under such provisions of its charter, had authority to issue certificates of indebtedness with which to retire the preferred stock, and to immediately convert such certificates into common stock.

—Weidenfeld v. Northern Pac. Ry. Co., 129 Fed. 305..63 C. C. A. 537

Where a stockholder of a corporation brought suit to restrain it from carrying out a scheme to retire its preferred stock and to issue common stock in its place, but the thing primarily complained of was the ownership of a majority of the corporation's stock by a securities company formed for that purpose, the end sought being the destruction of the securities company's title to its stock and its status as a stockholder, the securities company is an indispensable party defendant, and is not represented in the suit by the corporation.

—Weidenfeld v. Northern Pac. Ry. Co., 129 Fed. 305..63 C. C. A. 537

Where, at the time of the reorganization of a railroad company, preferred stock was issued under a resolution of the stockholders on the express condition that the company, at its option, might retire the same at its election on certain dates, and each certificate contained a recital

of such condition, each preferred stockholder acquired his stock subject to the terms of an express contract which denied him the right to share in new stock issued as a part of a scheme for the retirement of such preferred stock, and that when his stock was so retired he thereupon became a stranger to the company.

—Weidenfeld v. Northern Pac. Ry. Co., 129 Fed. 305..63 C. C. A. 537

Where a corporation issued certificates of indebtedness with which to retire its preferred stock, for which the holders of the common stock were entitled to subscribe, a common stockholder could not object that the transaction was invalid on the ground that the preferred stockholders were not entitled to share therein.

—Weidenfeld v. Northern Pac. Ry. Co., 129 Fed. 305..63 C. C. A. 537

§ 2. Members and stockholders.

Neither a corporation nor a receiver suing in its name and behalf can maintain a suit to set aside a contract made between the corporation and all its stockholders. Such a contract can only be attacked by or on behalf of creditors who are shown to have been defrauded thereby.

—Great Western Min. & Mfg. Co. v. Harris, 128 Fed. 321.....
63 C. C. A. 51

§ 3. Officers and agents.

Officers of a mining corporation which is a party to a suit in equity in which it has been ordered to permit an inspection and survey of its mine are bound by such order, although not personally parties to the suit, and may be subjected to punishment for contempt, where, having the power to require compliance with it by the company, they refuse to do so.

—Heinze v. Butte & B. Consol. Min. Co., 129 Fed. 274..63 C. C. A. 388

§ 4. Insolvency and receivers.

A corporation, which had endeavored without success to sell an issue of bonds at 60 per cent. of their par value, received an offer of 85 per cent. for the bonds with a bonus of stock equal to 50 per cent. of the bond issue. It accepted such offer, making an agreement with its stockholders by which they furnished the stock pro rata, and received therefor 25 cents out of every 85 paid by the bond purchasers. At the same time the corporation issued to them additional stock equal to a part of the amount sold, reciting as consideration therefor the previous making of permanent betterments on its property from net profits. *Held*, that such stock transaction did not affect the corporation, or the value of its assets, so as to entitle it or its bondholders or creditors to recover from the old stockholders the amounts so received by them as assets wrongfully withdrawn from the corporation; its effect, so far as creditors were concerned, being the same as though it had sold its bonds at 60 per cent.

—Great Western Min. & Mfg. Co. v. Harris, 128 Fed. 321.....
63 C. C. A. 51

A receiver of the property and assets of an insolvent corporation, appointed by a court in the exercise of its general equity powers, cannot maintain a suit to collect moneys in another jurisdiction, either in his own name or that of the corporation, nor can he be authorized by the court to do so, unless in the exercise of a power given it by statute or otherwise it has vested title in the receiver, or where the corporation, acting within its corporate powers, has vested him with such title or authorized him to sue in its name.

—Great Western Min. & Mfg. Co. v. Harris, 128 Fed. 321.....
63 C. C. A. 51

COSTS.

§ 1. In criminal prosecutions.

St. 11 Hen. VII, c. 12, providing that every poor person having a cause of action against another shall have writs, according to the nature of his cause, without payment of fees, and assignment of counsel by the court,

who shall act for him without reward, had reference only to a plaintiff prosecuting a civil action, and did not apply to criminal appeals.

—*Bristol v. United States*, 129 Fed. 87.....63 C. C. A. 529

Act Cong. July 20, 1892, 27 Stat. 252, c. 209 [U. S. Comp. St. 1901, p. 706], providing that any citizen entitled to commence any action or suit in any court of the United States may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor, before or after bringing suit or action, does not entitle a defendant in a criminal case to prosecute a writ of error out of the United States Circuit Court of Appeals in forma pauperis, such writ constituting a continuation of the original litigation, and not a commencement of a new action.

—*Bristol v. United States*, 129 Fed. 87.....63 C. C. A. 529

COUNTIES.

See "Municipal Corporations," § 1.

Effect in federal court of decisions of state court as to validity of bonds. see "Courts," § 3.

Enactment and validity of statutes authorizing issue of bonds, see "Statutes," § 1.

§ 1. Fiscal management, public debt, securities, and taxation.

The fact that, after the passage of an act authorizing counties through which a railroad was projected to subscribe to the stock of the company, such company was consolidated with another, as permitted by the laws of the state, and the name was changed, did not deprive a county of the power to thereafter make a valid subscription to the stock of the company under the new name, nor invalidate bonds issued in payment of such subscription.

—*Board of Com'rs of Henderson County v. Travelers' Ins. Co.*, 128 Fed. 817.....63 C. C. A. 467

Article 2, § 14, of the Constitution of North Carolina adopted in 1868, requiring acts creating or authorizing state, county, or municipal debts to be passed in a specified manner by the Legislature, did not supersede prior legislation nor affect the validity of acts previously passed, nor did it render invalid county bonds issued thereafter under authority given by an act previously passed without such specified formalities.

—*Board of Com'rs of Henderson County v. Travelers' Ins. Co.*, 128 Fed. 817.....63 C. C. A. 467

COURTS.

Contempt of court, see "Contempt."

Courts martial, see "Army and Navy."

Jurisdiction of proceedings for naturalization, see "Aliens," § 3.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

§ 1. Nature, extent, and exercise of jurisdiction in general.

Whether an action to recover pecuniary damages for trespass to real estate is real and local, or is personal and transitory, is essentially a matter of state policy or local law, and must be determined by the view taken of the nature of the action in the state in which it is brought.

—*Peyton v. Desmond*, 129 Fed. 1.....63 C. C. A. 651

In Minnesota an action to recover pecuniary damages for trespass to real estate in another state is viewed, not as relating to the real estate, but only as affording a personal remedy, and transitory.

—*Peyton v. Desmond*, 129 Fed. 1.....63 C. C. A. 651

Where the facts stated and the relief demanded show that the gravamen of the action is the conversion of lumber manufactured out of trees wrongfully cut and removed from plaintiff's land by defendant, and that the purpose of the action is to recover the value of the lumber, and not damages for any depreciation in the value of the land, the action is transitory, although the trespass to the land is stated as illustrating the character of the conversion, and as bearing upon plaintiff's right to recover the value of the manufactured lumber.

—*Peyton v. Desmond*, 129 Fed. 1.....63 C. C. A. 651

The giving of an instruction in such an action, at the request of the defendant, that the measure of damages recoverable was the value of the logs as they stood in the trees, could not change the nature of the action, whether or not it stated the correct measure of damages; nor can it be invoked by defendant to defeat the jurisdiction of the court.

—*Peyton v. Desmond*, 129 Fed. 1.....63 C. C. A. 651

§ 2. Establishment, organization, and procedure in general.

The judicial power granted by section 1, art. 3, of the Constitution, is the power to try the 10 classes of cases specified in section 2 of that article. *Chisholm v. Georgia*, 2 Dall. 475, 1 L. Ed. 440.

These sections do not prohibit the Congress from vesting judicial power in other cases in courts or magistrates of the states or in executive officers, where the exercise of such power by them is a necessary or appropriate means by which to use the powers granted by the Constitution to the legislative department or to the executive department of the government.

—*Levin v. United States*, 128 Fed. 826.....63 C. C. A. 476

§ 3. United States courts.

In a suit by a railroad company in a federal court against a number of landowners to enjoin threatened interference with its use of its right of way through their lands, the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constitutes the value in controversy for jurisdictional purposes.

—*Louisville & N. R. Co. v. Smith*, 128 Fed. 1.....63 C. C. A. 1

A corporation must have been lawfully created under the laws of a state, to give a federal court jurisdiction of an action brought in its name on the ground of its citizenship in such state; the fact that as to certain persons, and in certain transactions, it may be a corporation de facto, is not sufficient.

—*Gastonia Cotton Mfg. Co. v. W. L. Wells Co.*, 128 Fed. 369.....
63 C. C. A. 111

An application for a charter for a corporation was made to the Governor of Mississippi in accordance with the laws of the state, and the proposed charter submitted was approved by him. The state statute provides that "the powers therein specified shall by the approval of the charter be vested in such corporation and it shall go into operation at the time and on the terms and conditions specified." The charter in question provided that the corporation should have power to commence business as soon as \$2,000 of its capital stock had been "subscribed and paid for." The three incorporators met, and subscribed for that amount of stock, elected themselves directors and officers, and commenced and thereafter carried on business in the corporate name, but neither then nor thereafter was any capital stock paid in, or certificates of stock issued; the business being carried on by the individuals, who drew money out as though it belonged to them individually, without any reference to the corporation, or to the contracts or obligations entered into in its name. *Held*, that the corporation never acquired a legal existence, and could not maintain an action in a federal court against a corporation of another state on the ground that it was a citizen of Mississippi.

—*Gastonia Cotton Mfg. Co. v. W. L. Wells Co.*, 128 Fed. 369.....
63 C. C. A. 111

The denial of a motion to set aside a verdict and for a new trial in the federal court presents no question which can be reviewed by the Circuit Court of Appeals.

—*Jefferson Hotel Co. v. Warren*, 128 Fed. 565.....63 C. C. A. 193

Where a transcript of the record is filed in the Circuit Court of Appeals after the time prescribed by the rules has expired, but before a motion is made to dismiss the appeal on that ground, such motion will not be granted.

—*The Kawallani*, 128 Fed. 879.....63 C. C. A. 347

Since the federal courts sitting in Texas observe the distinction between legal and equitable rights, an equitable defense cannot be maintained in an action of trespass to try title brought on the law side of a federal court sitting in that state, though under the state statutes equitable defenses are available in such action in the state courts.

—*McManus v. Chollar*, 128 Fed. 902.....63 C. C. A. 454

County bonds, which were authorized and valid when issued under the law of the state as declared by its Supreme Court in previous decisions, will not be declared invalid in the hands of bona fide holders by a federal court because the state court has since reversed its former rulings.

—*Board of Com'rs of Henderson County v. Travelers' Ins. Co.*, 128 Fed. 817.....63 C. C. A. 467

On an appeal to the Circuit Court of Appeals, where there is no question raised as to the credibility of any witness, or as to the weight of his testimony, and it is not important that the court should know just how the testimony was given, the testimony should not be printed in question and answer in the appeal record, but should be presented in narrative form.

—*Radford v. United States*, 129 Fed. 49.....63 C. C. A. 491

Code Cr. Proc. N. Y. § 385, providing the order in which jurors drawn for the trial of criminal cases shall be challenged, is not binding on the federal courts sitting in that state for the trial of criminal cases.

—*Radford v. United States*, 129 Fed. 49.....63 C. C. A. 491

In determining whether a chattel mortgage executed by a bankrupt was fraudulent on its face, the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property.

—*Dugan v. Beckett*, 129 Fed. 56.....63 C. C. A. 496

Under the rule laid down by the Supreme Court in the case of *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, an order in an equity suit adjudging the defendant guilty of contempt for violating an interlocutory injunction restraining infringement of a patent cannot be reviewed by the Circuit Court of Appeals, except upon an appeal from the final decree in the cause.

—*Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 129 Fed. 96.....63 C. C. A. 596

A decree on the merits, finding infringement of a patent, awarding a permanent injunction, and directing a reference to ascertain damages and profits, is an interlocutory decree granting an injunction, appealable under section 7 of the act creating the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828), as amended by Act June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550], and the appeal is entitled to precedence, as provided in said section, and to be advanced on the calendar for hearing, subject, however, to the rules of the court as to the filing of briefs, unless for reasons of exigency shown a special order is made for an earlier hearing.

—*Star Brass Works v. General Electric Co.*, 129 Fed. 102.....
63 C. C. A. 604

A judgment of a Circuit Court imposing a fine on a party for contempt for the violation of an injunction is a judgment in a criminal case, and

if unconditional and absolute, so that nothing remains but to execute it, is final and reviewable by the Circuit Court of Appeals on a writ of error.

—Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105.....63 C. C. A. 607

Plaintiff, a citizen of New York, and M., a citizen of Indiana, were trustees under a mortgage executed by an Indiana corporation to secure bonds, in which water hydrant rentals due from defendant, a city of Indiana, were pledged as security; but the mortgage provided that the corporation should receive such rentals until default in the payment of interest on the bonds. The ordinance, however, under which the franchise to the corporation was granted, provided that the rentals in question should be paid to a trustee as the grantee or his assigns might elect, and plaintiff was appointed such trustee. *Held*, that the trust created by the ordinance was separate from that created by the mortgage, and hence plaintiff was entitled to sue therefor in the federal courts sitting in Indiana, without joining the co-trustee mentioned in the mortgage.

—City of Seymour v. Farmers' Loan & Trust Co. of New York, 128 Fed. 907.....63 C. C. A. 633

Where a city ordinance, under which a water franchise was granted, provided that hydrant rentals should be paid to plaintiff, a nonresident corporation, as trustee, the fact that the original ordinance granting the franchise was not to the water company, but to M. and his assigns, who assigned the same to the water company, and that both M. and the company were citizens of the same state, did not preclude the trustee from bringing an action to recover such rents in the federal court, under Act Cong. Aug. 13, 1888, § 1, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], which provides that an assignee cannot bring an action based on an assignment in the federal courts, unless his assignor could have done so had no assignment been made.

—City of Seymour v. Farmers' Loan & Trust Co. of New York, 128 Fed. 907.....63 C. C. A. 633

Where writs of error are prosecuted in cases tried to the court on stipulation waiving a jury trial, as authorized by Rev. St. U. S. § 649 [U. S. Comp. St. 1901, p. 525], providing that under such circumstances the court's findings of fact shall have the effect of a verdict of a jury, the court of appeals is limited to reviewing exceptions taken to the admission or exclusion of evidence, and to rulings on question of law.

—Kruger v. Constable, 128 Fed. 908.....63 C. C. A. 634

§ 4. Concurrent and conflicting jurisdiction, and comity.

The power of the federal courts to interfere in interstate extradition proceedings should only be exercised in cases of urgency, where the error is plain and the necessity for federal intervention obvious.

—In re Strauss, 126 Fed. 327.....63 C. C. A. 99

In a suit in a federal court involving property which had been left by the will of the owner in trust for the benefit of the complainant, a decree was entered on a cross-bill ordering the sale of the property to satisfy a mortgage therein given by complainant to defendant, and directing that the surplus be paid to the trustees named in the will. Prior to the sale, complainant brought suits in a state court, praying for an accounting by such trustees and for their removal. *Held*, that such suits did not interfere with any property over which the federal court acquired jurisdiction which warranted the federal court in enjoining their prosecution.

—Copeland v. Bruning, 127 Fed. 550.....63 C. C. A. 435

COURTS-MARTIAL.

See "Army and Navy."

COVENANTS.

In leases, see "Landlord and Tenant."

§ 1. Actions for breach.

The proper admission, in an action for breach of a warranty of title, of the record of certain certiorari proceedings in a state court, did not render evidence in such proceedings admissible to prove the facts as against the parties to the case at bar.

—*Kruger v. Constable*, 128 Fed. 908.....63 C. C. A. 634

In an action for breach of a warranty of title, certain deeds and mortgages made by plaintiff's grantors were admissible, as bearing on the question of an alleged dedication by plaintiff's grantors while in possession of the property.

—*Kruger v. Constable*, 128 Fed. 908.....63 C. C. A. 634

In an action for breach of a warranty of title, a prior contract for the sale of the property, though inadmissible to contradict or vary the terms of the deed containing the warranty, was competent to show that the grantees, prior to the execution of the conveyance to them, knew of the existence of a certain map which included the property conveyed.

—*Kruger v. Constable*, 128 Fed. 908.....63 C. C. A. 634

CREDITORS.

See "Bankruptcy"; "Fraudulent Conveyances."

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 1.

CRIMINAL LAW.

Costs in criminal prosecutions, see "Costs," § 1.

Examination of witnesses, see "Witnesses," § 1.

Extradition of persons accused, see "Extradition."

Indictment, information, or complaint, see "Indictment and Information."

Jury, see "Jury," § 1.

Names in indictments, see "Names."

Practice in federal courts as affected by state laws, see "Courts," § 3.

Particular offenses.

See "Conspiracy," § 1; "Contempt."

Offenses against immigration laws, see "Aliens," § 2.

Offenses against internal revenue laws, see "Internal Revenue."

Offenses against postal laws, see "Post Office," § 2.

§ 1. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

It is sufficient to describe a person in a warrant by giving the initial letter of his first name instead of writing such name in full, especially where he ordinarily uses and is known by the initial.

—*Cox v. Durham*, 128 Fed. 870.....63 C. C. A. 333

§ 2. Evidence.

In a prosecution for conspiracy to defraud the United States by the execution of straw ball, the introduction of affidavits of justification could not be objected to under Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], prohibiting the introduction of evidence obtained from a party or witness by means of a judicial proceeding, by any of the conspirators except those who made the affidavits.

—*Radford v. United States*, 129 Fed. 49.....63 C. C. A. 491

§ 3. Trial.

Where there was nothing in defendant's affidavit accompanying his application to have the case reopened, and to be permitted to introduce further evidence after the testimony had been closed, either as to the nature of the evidence sought to be added, as to the witnesses by whom it was expected to be given, or the reason why it had not been offered sooner, to require the granting of the application, it was not an abuse of the court's discretion to deny the same.

—*Alexis v. United States*, 129 Fed. 60.....63 C. C. A. 502

Where the court charged that defendant had a perfect right to testify, and, having done so, his testimony should be treated like that of any other witness, and that it was for the jury to find whether or not he had told the truth, it was not error to add that, in considering defendant's testimony, which, if true, entitled him to an acquittal, the jury should consider the very grave interest which he had at stake in the case.

—*Alexis v. United States*, 129 Fed. 60.....63 C. C. A. 502

Where the court properly charged the law relating to reasonable doubt, and declared that defendant was presumed to be innocent, and that such presumption obtained until the government convinced the jury beyond a reasonable doubt that he was guilty, it was not error to add that, if a doubt arose which was an unreasonable doubt, the jury should pay no attention thereto.

—*Alexis v. United States*, 129 Fed. 60.....63 C. C. A. 502

Where, in so far as requests to charge were correct, they were given by the court, either in modifications thereto or in the general charge, and each of them contained matter that was either erroneous, or not pertinent to the proof, the requests were properly denied.

—*Alexis v. United States*, 129 Fed. 60.....63 C. C. A. 502

§ 4. Motions for new trial and in arrest.

A defendant in a criminal case has no right to be personally present at the hearing of a motion in his behalf for a new trial, and his absence at such hearing will not invalidate a sentence subsequently passed on him.

—*Alexis v. United States*, 129 Fed. 60.....63 C. C. A. 502

§ 5. Appeal and error, and certiorari.

On the trial of a mail carrier for embezzling a letter and stealing an inclosure there was evidence tending to show that two decoy letters, one of which was the one defendant was charged with taking, were by mistake placed in the pigeonhole of another carrier, who, when sorting his letters, said to defendant, "I have got two letters for your route, and I am going to misbox them," and added loud enough for defendant to hear, "These fellows must take me for Hanlon." Held, that the exclusion and striking out of evidence offered by defendant to show that Hanlon was a former carrier on defendant's route, who had been convicted through decoy letters addressed like the two intended for defendant, on the theory that defendant, being so warned, would not have been likely to take either of such letters, was without prejudice, even conceding that evidence of such collateral character was admissible, there being sufficient in the previous testimony to advise the jury in a general way who Hanlon was.

—*Bromberger v. United States*, 128 Fed. 346.....63 C. C. A. 76

The refusal of the court to exclude a witness during the trial of a criminal case is discretionary, and will only be reviewed for abuse of discretion.

—*Bromberger v. United States*, 128 Fed. 346.....63 C. C. A. 76

The denial of a motion to quash an indictment, on the ground that it was based on incompetent evidence of essential facts before the grand jury is a matter of discretion, and is not a proper subject of exception.

—*Radford v. United States*, 129 Fed. 49.....63 C. C. A. 491

Where, in a prosecution for conspiracy, the court held that certain evidence introduced was admissible as against one of the conspirators only,

and called the government attorney's attention explicitly to the fact that it was inadmissible as against the others, the admission of such evidence was not subject to exception on the part of the other defendants.

—Radford v. United States, 129 Fed. 49.....63 C. C. A. 491

The omission of the court to give instructions that were not requested by defendant was not ground for reversal.

—Alexis v. United States, 129 Fed. 60.....63 C. C. A. 502

CUSTOMS AND USAGES.

As affecting validity of sales, see "Sales," § 1.

Relating to use of land under water, as affecting ownership, see "Navigable Waters," § 1.

A custom of brokers in a certain city to employ subagents to assist in securing purchasers for mining claims, and to allow them commissions out of the purchase price for their services, ordinarily secured by raising the price of the property, was contrary to public policy, as directly leading to fraud and questionable practices.

—Chilberg v. Lyng, 128 Fed. 899.....63 C. C. A. 451

A general custom in a certain city for brokers intrusted with the sale of mining properties to employ subagents to assist in securing purchasers, and to allow them commissions out of the purchase price for their services, is not binding on the owner of mining claims left with a broker for sale, in the absence of proof of the owner's knowledge thereof.

—Chilberg v. Lyng, 128 Fed. 899.....63 C. C. A. 451

CUSTOMS DUTIES.

§ 1. Goods subject to duty, rate, and amount.

Grass piquets, used for millinery purposes, consisting of stalks of oats and wheat, cut in the milk, and grasses, some of which are mixed with palm leaf and artificial leaves, bound together in bunches about 15 inches long, and all dyed to imitate the natural color of the plants, are dutiable under the provision in paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], for "artificial or ornamental * * * fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed," and not under paragraph 449 of said act, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], as manufactures of grass.

—Herman & Guinzburg v. United States, 128 Fed. 420..63 C. C. A. 162

Held, that certain bottles made of molded or pressed glass, with stoppers that have been cut or ground more than is necessary for fitting, are dutiable under paragraph 100, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], relating to "glass bottles * * * cut, * * * ground (except such grinding as is necessary for fitting stoppers)," and not as "molded or pressed * * * glass bottles," under paragraph 99 of said act (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]).

—Utard v. United States, 128 Fed. 422.....63 C. C. A. 164

Sticks of carbon intended and adapted to be used in electric lighting, but requiring to be cut into shorter lengths and to have the ends shaped before they are suited for such use, are dutiable under the provision in paragraph 97, Tariff Act July 24, 1897, c. 11, Schedule A, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], for "articles and wares composed wholly or in chief value of * * * carbon, not specially provided for, * * * if not decorated," and not under paragraph 98 of said act, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], as "carbons for electric lighting."

—United States v. Downing, 129 Fed. 90.....63 C. C. A. 532

Held, that so-called wool "dress robes" or "dress patterns," consisting of women's dress goods of wool, embroidered with silk, imported in single

patterns in separate lengths and pieces, each pattern comprising the material for the body and trimming of a dress, are "dress goods," and are dutiable under the provision in paragraph 369, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], for "women's * * * dress goods * * * composed wholly or in part of wool," which is limited by the expression "not specially provided for in this act," and not under paragraph 371 of said act, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667], which provides, without such limitation, for "articles embroidered, * * * made of wool," nor under paragraph 370 of said act, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], relating to "articles of wearing apparel of every description, * * * manufactured * * * in part, * * * composed wholly or in part of wool."

—*Thomas v. Wanamaker*, 129 Fed. 92.....63 C. C. A. 594

DAMAGES.

Mistake in computation as ground for correction of judgment, see "Judgment," § 2.

Release of claims for, see "Release," § 1.

Damages for particular injuries.

See "Collision," § 5.

Breach by buyer of contract for sale of goods, see "Sales," § 4.

Breach of warranty, see "Sales," § 5.

Delay in delivery of message, see "Telegraphs and Telephones," § 1.

From failure to care for injured seaman, see "Seamen."

Wrongful attachment, see "Sheriffs and Constables," § 1.

§ 1. Grounds and subjects of compensatory damages.

In an action for breach of a contract to manufacture and deliver to plaintiff patented picks intended for sale to Alaska miners, by reason of defendant's failure to deliver the same as agreed, no element of loss of profits could be considered in the computation of damages which was uncertain, speculative, and not clearly and unqualifiedly proved.

—*Iron City Toolworks v. Wellisch*, 128 Fed. 693.....63 C. C. A. 245

§ 2. Pleading, evidence, and assessment.

In an action to recover for breach of defendant's contract to manufacture and deliver patented picks to plaintiff, which he intended to sell to Alaska miners, evidence of anticipated profits, based on plaintiff's sale of a sample pick or picks to a miner, which had been made in a blacksmith shop, at retail, before the making of the contract, and as to his opinion concerning the market for the same had they been delivered as agreed, was inadmissible, as too remote and speculative.

—*Iron City Toolworks v. Wellisch*, 128 Fed. 693.....63 C. C. A. 245

DEATH.

§ 1. Actions for causing death.

A steamer abandoned a small schooner which she had in tow on the parting of the tow line off the coast of Alaska at a point where the coast was dangerous, leaving five men on board, who were not competent to handle the vessel, nor having equipment for her navigation. Neither the schooner nor the men on board were seen again, with the exception of one, whose body was found on the beach. In an action against the owners of the steamer to recover damages for the death of one of the men under the Alaska statute, the jury returned a special finding that when the schooner was last seen from the steamer both vessels were within three miles of land, and they also found, on evidence which justified such finding, that decedent came to his death within such limit, and before the fol-

lowing morning. *Held* that, although the vessels may have been outside the three-mile limit when the line parted, the duty of the steamer to return to the rescue of the schooner, the failure to perform which was the proximate cause of her loss with those on board, continued, and that an instruction that if the jury found such facts, and that the death resulted from the failure of the steamer to perform such duty, the plaintiff was entitled to recover, was correct.

—*Alaska Commercial Co. v. Williams*, 128 Fed. 362..63 C. C. A. 92

Rev. St. Fla. 1892, §§ 2342, 2343, authorize actions for wrongful death to be brought, among others named, by the executor or administrator of the deceased; the measure of damages in such case being the loss to the estate. Such sections were supplemented by Laws 1899, p. 114, c. 4722, which authorizes an action for the wrongful death of a minor child by the father or mother of such child, in which the plaintiff "may recover, not only for the loss of services of such minor child, but, in addition thereto, such sum for the mental pain and suffering of the parent or parents as the jury may assess." *Held* that, where the father of a minor who was killed was also the administrator, he might sue for the death in both capacities in the same action, joining counts under each statute in the same declaration.

—*Callison v. Brake*, 129 Fed. 196.....63 C. C. A. 354

Instructions in an action by an administrator to recover damages for wrongful death under the statute of Florida considered and approved, as in conformity with a prior decision of the court.

—*Callison v. Brake*, 129 Fed. 196.....63 C. C. A. 354

DEBTOR AND CREDITOR.

See "Bankruptcy"; "Fraudulent Conveyances."

DEEDS.

Cancellation, see "Cancellation of Instruments."

Covenants in deeds, see "Covenants."

Parol or extrinsic evidence, see "Evidence," § 5.

To public lands, see "Public Lands," § 2.

§ 1. Construction and operation.

A deed of lands to two persons as individuals on its face conveys to each an undivided half interest, and no presumption arises that the lands are partnership property, even where it is shown that the grantees were partners in a mercantile business.

—*Lee v. Wysong*, 128 Fed. 833.....63 C. C. A. 463

A deed, for a consideration alleged to have been nominal, conveying land to a city to be used as a burying ground, and forever kept, used, and inclosed in a decent and substantial manner, and for no other use or purpose whatsoever, in which the grantors made no record of any intention on their part that the land should ever under any circumstances revert to them or their representatives, should not be construed as requiring the land to be maintained as a public burying place literally in perpetuity, without regard to the welfare of subsequent generations; and hence such provision was not a condition subsequent, the breach of which would terminate the title of the grantees.

—*Thornton v. City of Natchez*, 129 Fed. 84.....63 C. C. A. 526

DEFAMATION.

See "Libel and Slander."

DELAY.

Laches, see "Equity," § 2.

DELIVERY.

Of gift, see "Gifts," § 1.

Of goods sold, see "Sales," § 1.

DEPOSITIONS.

See "Witnesses."

DESCRIPTION.

Names of individuals, see "Names."

Of invention in application for patent, see "Patents," § 3.

DILIGENCE.

Of party asking relief, see "Specific Performance," § 1.

DIRECTING VERDICT.

In civil actions, see "Trial," § 1.

DISCHARGE.

From indebtedness, see "Release."

From liability as trustee, see "Bankruptcy," § 2.

Of mechanic's lien, see "Mechanics' Liens," § 1.

DISCRETION OF COURT.

Review, see "Appeal and Error," § 5; "Criminal Law," § 5.

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 2.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 3.

DIVIDENDS.

On corporate stock, see "Corporations," § 1.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 4.

DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 3.

DONATIONS.

See "Gifts."

DUTIES.

Customs duties, see "Customs Duties."

EASEMENTS.**§ 1. Extent of right, use, and obstruction.**

Different landowners may be joined as defendants in a single suit by a railroad company to enjoin interference with its use of its right of way and with the maintenance of its track, where the right asserted is the same against each defendant.

—Louisville & N. R. Co. v. Smith, 128 Fed. 1.....63 C. C. A. 1

Equity has jurisdiction by injunction to prevent interference with easements or their destruction, and a bill by a railroad company against a number of defendants, alleging that as owners of lands through which its road runs they are interfering with its right of way, denying its right to the same, threatening suits, and preventing it from keeping its roadbed in repair, states a cause of action for equitable relief.

—Louisville & N. R. Co. v. Smith, 128 Fed. 1.....63 C. C. A. 1

EJECTION.

Of passenger, see "Carriers," § 1.

EJECTMENT.

See "Trespass to Try Title."

EMBEZZLEMENT.

From mails, see "Post Office," § 2.

Name in indictment, see "Names."

EMINENT DOMAIN.**§ 1. Remedies of owners of property.**

An injunction will not be granted to restrain proceedings by a railroad company to condemn land for right of way in Washington on the ground that it is not for a public use, since, under the statutes of the state, as construed by its Supreme Court, that question may be litigated in the condemnation proceedings.

—Black Hills & N. W. Ry. Co. v. Tacoma Mill Co., 129 Fed. 31263 C. C. A. 544

EMPLOYES.

See "Master and Servant."

EQUITABLE ESTOPPEL

See "Estoppel."

EQUITY.

Equitable estoppel, see "Estoppel," § 1.

Procedure on removal from state to federal courts, see "Removal of Causes," § 1.

Relief against judgment, see "Judgment," § 2.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Fraudulent Conveyances"; "Receivers"; "Specific Performance."

Suits for infringement of patents, see "Patents," § 5.

§ 1. **Jurisdiction, principles, and maxims.**

Where railroad bonds were deposited for specific uses with a trust company, which afterwards wrongfully refused to return the same on demand, the fact that, because the bonds were not dealt in on the exchanges, and were obligations of a corporation which had become practically defunct, it was rendered difficult to establish their value, did not justify plaintiff in resorting to a court of equity to recover the same.

—Sawyer v. Atchison, T. & S. F. R. Co., 129 Fed. 100..63 C. C. A. 602

§ 2. **Laches and stale demands.**

Lands sued for had been conveyed by plaintiffs' decedents in 1817 to a city for cemetery purposes, and for no other use whatsoever. In 1890 the city took up the remains of the bodies previously buried therein, and deposited them in a mound in a remote portion of the land, marked with a plain stone, and thereafter improved and used the land conveyed as a public park. *Held*, that since the personal representatives of the grantees, by the exercise of reasonable diligence, could have had knowledge of such change of use shortly after it occurred, and before 1901, when suit was brought to recover the land, they were barred by laches from maintaining the same.

—Thornton v. City of Natchez, 129 Fed. 84.....63 C. C. A. 526

§ 3. **Pleading.**

By setting down pleas for argument, a complainant admits the facts, but not the conclusions, pleaded therein.

—General Electric Co. v. New England Electric Mfg. Co., 128 Fed. 73863 C. C. A. 448

ERROR, WRIT OF.

See "Appeal and Error."

ESTATES.

Estates for years, see "Landlord and Tenant."

ESTOPPEL

Of insurer to claim that insured's rights were barred by attempted arbitration, see "Insurance," § 5.

Of landlord to deny consent to assignment of lease, see "Landlord and Tenant," § 1.

To deny validity of municipal bonds, see "Municipal Corporations," § 1.

§ 1. Equitable estoppel.

Where a city held the title to land under a navigable stream in trust for the public, and a river commission was authorized to establish wharves, bulkheads, boom lines, etc., the fact that neither the city nor the commission objected to the construction of expensive works, including bulkheads, etc., in the river, by a riparian proprietor, did not estop the city to deny such proprietor's right to continue to occupy the same.

—City of Mobile v. Sullivan Timber Co., 129 Fed. 298.....
63 C. C. A. 412

The fact that both parties to a suit mistakenly supposed that a supersedeas bond on an appeal from the Supreme Court of the state to the United States Supreme Court operated to suspend a prohibitory injunction did not estop one of the parties from contending, in an action on the bond, that such was not its effect.

—Green Bay & M. Canal Co. v. Norrie, 128 Fed. 896..63 C. C. A. 432

EVIDENCE.

See "Witnesses."

Harmless error in exclusion, see "Criminal Law," § 5.

Objections for purpose of review, see "Appeal and Error," § 2.

Reception at trial, see "Criminal Law," § 3.

Review, see "Admiralty," § 4; "Appeal and Error," § 5.

As to particular facts or issues.

See "Damages," § 2; "Statutes," § 2.

In actions by or against particular classes of parties.

See "Carriers," § 1; "Innkeepers."

In particular civil actions or proceedings.

See "Bankruptcy," § 1; "Cancellation of Instruments," § 2; "Libel and Slander," § 1; "Negligence," § 2; "Trespass to Try Title," § 1.

Admiralty, see "Admiralty," § 3; "Collision," § 5.

For breach of covenant, see "Covenants," § 1.

For loss of goods shipped by vessel, see "Shipping," § 2.

For personal injuries, see "Carriers," § 1.

On benefit certificate, see "Insurance," § 6.

In criminal prosecutions.

See "Criminal Law," § 2.

For violation of internal revenue laws, see "Internal Revenue."

For violation of postal laws, see "Post Office," § 2.

§ 1. Judicial notice.

Where the maritime law of a foreign county, which is different from our own, is relied upon to defeat an action, it must be both alleged and proved.

—The Matterhorn, 128 Fed. 863.....63 C. C. A. 331

Where, in a proceeding for the forfeiture of a vessel for violating internal revenue laws, in transporting and secreting certain *okolehoe*, there was no controversy that the liquor transported and secreted was the product of the ti root, grown in Hawaii, which the Supreme Court of such republic had previously held was a "well-known spirituous liquor, of great strength, and very intoxicating," it was not necessary that proof of the intoxicating qualities of such liquor should be introduced.

—The Kawaiiani, 128 Fed. 879.....63 C. C. A. 347

§ 2. Best and secondary evidence.

Where a member of a fraternal insurance association, which passed an invalid by-law, attempting to arbitrarily reduce the amount payable on the certificates of its members on their death, on making the first

payment, notified the association by letter that he did not ratify or consent to the reduction, and it was shown that deceased wrote the letter giving such notice to the association, and made a press copy of it, which he gave to plaintiff, and there was evidence also showing that he mailed the letter with the assessment, and the association admitted the receipt of the assessment, and did not deny the receipt of the letter, it was not error to admit the press copy in evidence; the question whether the original was mailed, or not, being for the jury.

—Supreme Council A. L. H. v. Champe, 127 Fed. 541...63 C. C. A. 282

§ 3. Admissions.

In a libel suit for publishing an article charging plaintiff with having been a conspirator in a scheme to procure fraudulent life insurance and murder the insured, evidence that two other conspirators had made an attempt to poison one of the insured, and that one of them had been indicted, tried, and convicted for murder, is inadmissible.

—Morning Journal Ass'n v. Duke, 128 Fed. 657.....63 C. C. A. 459

§ 4. Documentary evidence.

The introduction in evidence without qualification of an account containing debit and credit items makes each side evidence of its contents.

—Simpson v. First Nat. Bank, 129 Fed. 257; First Nat. Bank v. Simpson, Id.....63 C. C. A. 371

But where there is other evidence the court or jury is not required to give equal credit to each side of the account, to the admissions against interest, and to the self-serving statements contained in it. They may, and they should, determine the fact for or against the evidence contained in the account as the preponderance of all the evidence in the case and the rules of law require.

—Simpson v. First Nat. Bank, 129 Fed. 257; First Nat. Bank v. Simpson, Id.....63 C. C. A. 371

In the absence of all other evidence, the debits and credits of such an account offset each other, and the account proves its balance only. An admission must be taken with its qualifications as an entirety.

—Simpson v. First Nat. Bank, 129 Fed. 257; First Nat. Bank v. Simpson, Id.....63 C. C. A. 371

§ 5. Parol or extrinsic evidence affecting writings.

Where a contract has been reduced to writing, and imports on its face to be a complete expression of the whole agreement, it will be presumed that the parties have introduced into it every material item and term; and hence parol evidence is inadmissible to add another term to the agreement, though the writing contains nothing on the particular point to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks; and the legal import can no more be varied by parol than can what is written.

—Union Selling Co. v. Jones, 128 Fed. 672.....63 C. C. A. 224

Though proof of the surrounding circumstances may be introduced to aid a proper construction of uncertain or ambiguous terms in a written contract, such surrounding circumstances do not include prior representations, proposals, and negotiations of a promissory character, leading up to and superseded by the written agreement.

—Union Selling Co. v. Jones, 128 Fed. 672.....63 C. C. A. 224

Where a contract for the sale of binder twine contained the words "Quality guaranteed," such words were not uncertain or ambiguous, but should be construed to import a warranty that the twine was reasonably fit for the use for which binder twine is designed, and should be salable or marketable under that description, and hence parol evidence was inadmissible to show that such warranty, by reason of prior negotiations between the parties, was intended to include certain representations as to quality.

—Union Selling Co. v. Jones, 128 Fed. 672.....63 C. C. A. 224

63 C.C.A.—46

Where a broker engaged to sell certain mines agreed to effect the sale for a commission of 5 per cent., evidence of a custom of brokers to employ subagents to assist in the sale, and to allow them a commission out of the purchase price for a sale affected, was inadmissible, as tending to vary the unambiguous agreement of the parties.

—*Chilberg v. Lyng*, 128 Fed. 899.....63 C. C. A. 451

Where, in trespass to try title, there was no ambiguity in any of the conveyances, except that the common grantor had made absolute deeds to different parties covering the same tract of land, and the words of description were plain and unequivocal, letters written by such grantor to the grantee under the later deed, preliminary to the conveyance to him, were inadmissible to vary or explain the same.

—*McManus v. Chollar*, 128 Fed. 902.....63 C. C. A. 454

§ 6. Opinion evidence.

Where all the facts of a transaction are clearly stated by a witness, his inference or understanding therefrom is wholly immaterial and inadmissible.

—*Gentry v. Singleton*, 128 Fed. 679.....63 C. C. A. 231

EXAMINATION.

Of witnesses in general, see "Witnesses," § 1.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 2.

Taking exceptions at trial, see "Trial," § 2.

EXCISE.

Duties, see "Internal Revenue."

EXECUTION.

See "Garnishment."

§ 1. Stay, quashing, vacating, and relief against execution.

A judgment defendant is not entitled to a stay of execution on the ground that an unsatisfied judgment previously obtained by it against the plaintiff, but which it assigned to a third party, may in a certain contingency be re-assigned so as to enable defendant to set it off against the present judgment.

—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 83263 C. C. A. 62

EXPLOSIVES.

The defendants were lawfully engaged in blasting rock out of the right of way of a railroad company at a point about 150 feet from a river. The decedent was rightfully walking along the bank of the river a short distance below a point opposite the place of blasting, holding the prow of a ferryboat away from the bank with a pole, while the ferryman was walking ahead of him, pulling the boat up the stream, in the customary way, preparatory to poling it across. The decedent had engaged his passage across the river upon the boat. The custom of the defendants was to send men out, shouting "Fire," at short intervals for a period of 12 or 15 minutes before exploding a charge of gunpowder or dynamite, and the charges had been so heavy that rocks had fallen all around the place

where the decedent and the ferryboat were, and had broken limbs and stripped foliage from the trees of the forest which intervened between the right of way and the river, and concealed the boatmen from those engaged in blasting, who were not aware of their presence before the explosion. The decedent had worked for the defendants, and knew these facts and this custom. Seven witnesses heard the cry of fire 12 to 15 minutes before the explosion. Three heard it from 2 to 5 minutes before. When the ferryman heard it, he shouted "Don't shoot," and he and the decedent continued to ascend the stream within 200 or 300 feet of the place of blasting. The ferryman heard it again, and answered it again, and they continued up the river. The ferryman heard it a third time, answered again, the signal to explode the blast was given, the charge was fired, and a rock fell upon the decedent and killed him. The defendant's witnesses testified that they did not hear the cry "Don't shoot."

Held, the question whether or not the decedent was guilty of contributory negligence was for the jury.

—Cary Bros. & Hannon v. Morrison, 129 Fed. 177....63 C. C. A. 267

It is the duty of one who is lawfully using property near to that upon which another is legally engaged in blasting, and who is warned of a coming explosion, to use reasonable diligence to escape from danger on account of it; and a failure to exercise such care, which concurs in producing his injury, waives his right of action for the trespass, and constitutes contributory negligence, which is fatal to his action for damages for the injury.

—Cary Bros. & Hannon v. Morrison, 129 Fed. 177....63 C. C. A. 267

While a contractor may lawfully use blasting with gunpowder or dynamite to remove rock in the right of way of a railroad company, he has no right by its use to throw rocks upon persons rightfully occupying or using neighboring property. Such an act is a trespass, and it is his duty to give such persons reasonable warning of coming explosions.

—Cary Bros. & Hannon v. Morrison, 129 Fed. 177....63 C. C. A. 267

Blasting by the use of gunpowder or dynamite is an appropriate and justifiable mode of removing rock from the right of way of a railroad in order to bring it to grade, and a railroad company or its grading contractors may lawfully employ it, with reasonable care.

—Cary Bros. & Hannon v. Morrison, 129 Fed. 177....63 C. C. A. 267

EXTRADITION.

Power of federal court to interfere in interstate extradition proceedings, see "Courts," § 4.

§ 1. Interstate.

Proof that defendant committed a crime in Ohio, and when sought to be subjected to the criminal process of that state he was found in New York, was sufficient to establish that he was a fugitive from justice.

—In re Strauss, 126 Fed. 327.....63 C. C. A. 99

Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], provides that whenever the executive authority of any state demands any person as a fugitive from justice of any other state or territory to which such person has fled, and produces a copy of an indictment or affidavit made before a magistrate of any state or territory charging the person demanded with having committed a felony or any other crime, etc., the accused shall be apprehended. *Held*, that it is not necessary that extradition proceedings under such statute shall be based on an indictment, but that a verified complaint or affidavit charging a person with an infamous crime is sufficient to confer jurisdiction on the Governor of the state to which the defendant has fled.

—In re Strauss, 126 Fed. 327.....63 C. C. A. 99

Where an Ohio statute provided that any person who obtained of another anything of value by any false pretense, with intent to defraud, shall be guilty of an offense which, if the value of the property be \$35 or more, is punishable by imprisonment, an affidavit charging that accused, on a particular day, in M. county, Ohio, unlawfully and falsely pretended to a certain watch company, with intent to defraud it, that he was the owner of a dry goods store in Y., Ohio, which statement was false and known so to be by accused, and by means of such false statement accused obtained from the company jewelry worth \$400, sufficiently stated an offense, under the Ohio laws, to sustain extradition proceedings.

—In re Strauss, 126 Fed. 327.....63 C. C. A. 90

FACTORS.

See "Brokers."

FALSE IMPRISONMENT.

§ 1. Civil Liability.

A warrant commanding the arrest of J. I. Cox, and reciting the filing of a complaint charging said Cox, "late of the county of Boulder and state of Colorado," with having committed a crime in such county, and being a fugitive from justice, protects the officer in the arrest thereon of James T. Cox, commonly known as J. T. Cox, where he was the person in fact intended, although he was not late of said county nor a fugitive from justice, the description being sufficient, and those being matters to be determined on his trial, and not by the officer.

—Cox v. Durham, 128 Fed. 870.....63 C. C. A. 338

Whether a warrant of arrest sufficiently describes the person arrested thereon to afford protection to the officer making the arrest against an action for false imprisonment is a question for the court, where the facts are undisputed.

—Cox v. Durham, 128 Fed. 870.....63 C. C. A. 338

FEDERAL COURTS.

See "Courts."

FEES.

Of attorney, see "Attorney and Client," § 1.

FELLOW SERVANTS.

See "Master and Servant," § 1.

FILING.

Assignment of error, see "Appeal and Error," § 4.

FINAL JUDGMENT.

Review by circuit courts of appeals, see "Courts," § 3.

FINAL RECEIPT.

Title to public lands, see "Public Lands," § 2.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 5.

FIRE INSURANCE.

See "Insurance," § 5.

FIRES.

Liability of innkeeper for destruction of guest's goods by, see "Innkeepers."

FIXTURES.

A leather belt, which transmits the power from a stationary engine to a main shaft for the operation of the machinery of a marble mill, is a part of the realty, and is not subject to attachment and removal as personal property.

—Giddings v. Freedley, 128 Fed. 355.....63 C. C. A. 85

FORECLOSURE.

Of mortgage, see "Railroads," § 2.

FOREIGN JUDGMENTS.

See "Judgment," § 3.

FOREIGN LAWS.

Judicial notice, see "Evidence," § 1.

FORFEITURES.

For violation of internal revenue laws, see "Internal Revenue."

Of insurance, see "Insurance," § 3.

FRAUD.

See "Fraudulent Conveyances."

FRAUDS, STATUTE OF**§ 1. Sales of goods.**

Plaintiff and defendant made two oral contracts, one for the sale of all the stock of the S. Company to defendant for \$500,000, which was subsequently reduced to writing, and the other for the sale of 100 shares of the stock of the B. Company by defendant to plaintiff for \$10,000, which was not reduced to writing. *Held*, that in the absence of evidence that at the time the contract for the S. stock was reduced to writing and delivered the parties restated the prior oral agreement for the sale of the B. stock, and intended to validate the same as a part of the contract, the delivery and the performance of the contract for the sale of the S. stock did not

constitute a payment of a part of the purchase money for the sale of the B. stock at the time, so as to take that contract out of the statute of frauds.

—*Koewing v. Wilder*, 128 Fed. 558.....63 C. C. A. 186

FRAUDULENT CONVEYANCES.

See "Chattel Mortgages," § 1.

By bankrupt, see "Bankruptcy," § 2.

§ 1. Transfers and transactions invalid.

G., the owner of 110 shares of stock in a corporation, delivered a written assignment of his interest in its business to his wife in May, 1899, when he was free from debt. He retained the certificates of the shares, voted them, and received dividends upon them, in money and in stock, until February, 1903, when he had become heavily involved in debt. He then transferred the stock to his wife by an indorsement and surrender of the certificates to the corporation.

Held, G. had no intention in May, 1899, to then divest himself of the dominion and control of the stock, a delivery of the certificates of the stock was indispensable to accomplish such a purpose, and the delivery of the written assignment, while the donor retained and used the certificates to control the stock, was insufficient to complete a valid gift.

—*Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.....
63 C. C. A. 401

FUGITIVE FROM JUSTICE.

See "Extradition," § 1; "Habeas Corpus," § 1.

GARNISHMENT.

See "Execution."

§ 1. Proceedings to support or enforce.

Under the statutes of Arkansas, where the garnishee appears by affidavit, and does not appear in person, or submit to an examination, or make default, the plaintiff is not entitled to an order that the garnishee shall deliver the property of the defendant in his possession, or that he shall pay the money which he owes the defendant, into court. His remedy is by compelling an examination under oath, or by an action under section 360, Sand. & H. Dig.

—*Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.....
63 C. C. A. 401

GIFTS.

§ 1. Inter vivos.

A fixed intention by the donor to irrevocably divest himself of title, dominion, and control of the subject of the gift at the very time he attempts to make it, the actual accomplishment of that purpose, and the delivery of the subject of the gift, are indispensable conditions of a valid donation.

—*Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.....
63 C. C. A. 401

The delivery of the subject of the gift must be made in the most effectual mode to command dominion over it.

The delivery of certificates of shares of stock, when they are present and their delivery is practicable, is indispensable to a valid gift of stock in a corporation, because the possession of the certificates commands the dominion of the stock in the most effectual way.

—*Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.
63 C. C. A. 401

The delivery of a written assignment of stock in a corporation is ineffectual to make a valid gift, while the donor retains the certificates.

—Allen-West Commission Co. v. Grumbles, 129 Fed. 287.....
63 C. C. A. 401

GOOD FAITH.

Of purchaser, see "Sales," § 3; "Vendor and Purchaser," § 2.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

HABEAS CORPUS.

To determine legality of detention of Chinese in deportation proceedings, see "Aliens," § 1.

§ 1. Jurisdiction, proceedings, and relief.

Where a fugitive from justice was arrested under Code Cr. Proc. N. Y. §§ 828-830, providing for the preliminary apprehension of a fugitive from justice, and his commitment for a period not exceeding 30 days, to enable requisition to be made, the allowance of a writ of habeas corpus for the purpose of testing the validity of such temporary commitment by the magistrate was no bar to subsequent extradition proceedings before the Governor, under Rev. St. § 766 [U. S. Comp. St. 1901, p. 597], providing that pending the proceedings or appeal in extradition proceedings, and until final judgment therein, any proceeding against a person so imprisoned or confined in any state court, or under the authority of any state, for any matter so held and determined or in process of being held and determined under such writ of habeas corpus, shall be deemed null and void, the proceedings before the magistrate and the Governor being entirely dissimilar.

—In re Strauss, 126 Fed. 327.....63 C. C. A. 99

Disputed questions of fact cannot be reviewed on habeas corpus.

—In re Strauss, 126 Fed. 327.....63 C. C. A. 99

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 5.

In criminal prosecutions, see "Criminal Law," § 5.

HOMESTEAD.

Of public lands, see "Public Lands," § 2.

HUSBAND AND WIFE.

Adjudication of married woman as bankrupt, see "Bankruptcy," § 1.

IMMIGRATION.

Regulation, see "Aliens," § 2.

IMPORTS.

Duties, see "Customs Duties."

IMPRISONMENT.

See "False Imprisonment."

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."

Where a riparian proprietor, with the knowledge of a city holding the title to land under a navigable stream for the benefit of the public, constructed an expensive work, including wharves, booms, bulkheads, etc., on the land, in order to render the river available for use in lumbering operations, and thereafter such proprietor paid taxes and fees to the city for the privilege of erecting and maintaining such structures, the city was only entitled to a restoration of the land so used on payment of reasonable compensation to such proprietor for the loss sustained.

—City of Mobile v. Sullivan Timber Co., 129 Fed. 298.....
63 C. C. A. 412

INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INDIANS.

Conveyance of Indian lands pending action relating to them, see "Lis Pendens."

Act June 28, 1898 (30 Stat. 495, c. 517), provides for the bringing of suits by any tribe in the Indian Territory to dispossess intruders on lands of the tribe, and authorizes such suit by any member of the tribe where the chief or governor fails or refuses to bring it. Section 5 requires the party bringing such suit to serve notice on the adverse party to leave the premises at least 30 days before the suit is commenced; and by section 2 it is provided that when, in the progress of any civil suit in a court of the territory, it shall appear that the property of any tribe is affected by the issues, it shall be the duty of the court to make such tribe a party by service on the chief or governor. *Held* that, where a suit to dispossess an intruder was originally brought by a member of a tribe who had served the required notice, such notice was sufficient, although the Cherokee Nation afterward joined, and became the plaintiff in the suit.

—Hargrove v. Cherokee Nation, 129 Fed. 186.....63 C. C. A. 276

Where, in such a suit, it appeared that a defendant brought in by an amended complaint, by an agreement with the original defendants, obtained possession of the premises and improvements after the bringing of the suit, and wrongfully withheld possession from the tribe, a judgment may properly be rendered against him for the damages caused by his wrongful detention, as well as for possession of the property.

—Hargrove v. Cherokee Nation, 129 Fed. 186.....63 C. C. A. 276

A suit under Act June 28, 1898 (30 Stat. 495, c. 517), to dispossess an intruder on lands owned by an Indian tribe or nation, although brought by a member of the tribe, as permitted by such act, when the tribe fails or refuses to bring it, is based primarily on the right of the tribe, and the

court may properly permit it to be substituted as plaintiff, and to allow the name of the original plaintiff to be stricken out, with his consent.

—Brought v. Cherokee Nation, 129 Fed. 192.....63 C. C. A. 350

It is sufficient compliance with the requirement of such act that a "sworn complaint" shall be filed if the complaint is verified by the authorized attorney of the tribe or nation which is plaintiff, who states that the facts alleged are within his knowledge.

—Brought v. Cherokee Nation, 129 Fed. 192.....63 C. C. A. 350

Where the defendants in a suit by an Indian tribe to dispossess an intruder on its lands and recover damages for wrongful detention do not plead the value of their improvements, or ask to recover for the same, the court is without authority to set off such value against the damages awarded plaintiff.

—Brought v. Cherokee Nation, 129 Fed. 192.....63 C. C. A. 350

INDICTMENT AND INFORMATION.

Discretion of court as to rulings on motion to quash, see "Criminal Law," § 5.

For violation of internal revenue laws, see "Internal Revenue."

For violation of postal laws, see "Post Office," § 2.

Names in, see "Names."

Necessity to support extradition proceedings, see "Extradition," § 1.

§ 1. Motion to quash or dismiss, and demurrer.

The affidavit in support of a motion to quash an indictment on the ground that it was founded on incompetent testimony was to the effect that no other or different evidence than that given by deponent, which was objected to, was produced, or taken before the grand jury, pertaining to the question in issue, and that deponent was present "in and about the grand jury during the entire session thereof," was insufficient to show that no other testimony was introduced.

—Radford v. United States, 129 Fed. 49.....63 C. C. A. 491

INFRINGEMENT.

Of patent, see "Patents," § 5.

INJUNCTION.

Review by Circuit Courts of Appeals, see "Courts," § 3.

Restraining particular acts or proceedings.

Infringement of patents, see "Patents," § 5.

Proceedings in state courts, see "Courts," § 4.

Taking of property by railroad, see "Eminent Domain," § 1.

INNKEEPERS.

In an action against an innkeeper for baggage of a guest destroyed in his room by fire, an instruction that the guest had a right to rely to a large extent on statements made to him by the clerks and employes in the hotel, so far as the statements related to matters under their control, and that he had a right to rely on their statements as to the extent of the fire, not fully as experts, but within the bounds of reason, if under the circumstances he was justified in paying attention to their statements, etc., but that such statements would not exonerate him from the exercise

of his intelligence, was not objectionable, as authorizing the guest to rely exclusively on such statements.

—Jefferson Hotel Co. v. Warren, 128 Fed. 565.....63 C. C. A. 193

In an action by a guest against an innkeeper to recover for baggage destroyed by fire while in the room which the guest was occupying, evidence *held* to authorize the submission to the jury of the question whether such guest was guilty of contributory negligence in failing to take measures to save the property before its destruction.

—Jefferson Hotel Co. v. Warren, 128 Fed. 565.....63 C. C. A. 193

Where, in an action for loss of a guest's baggage in a hotel fire, the court had previously charged that plaintiff was not entitled to rely on statements made by people in the hall of the hotel, who were not officially connected therewith, as to the extent of the fire, an instruction that plaintiff was not justified in relying on any statements made by people in the hall, as they were only expressions of opinion, and not binding on the defendant unless the statements were made by servants of the defendant or persons in charge of the hotel, was not error.

—Jefferson Hotel Co. v. Warren, 128 Fed. 565.....63 C. C. A. 193

In an action for the destruction of a guest's baggage in a hotel fire, evidence that, on the guest complaining to the clerk that he did not desire a room as high as the fourth floor, the clerk assured him that the hotel was fireproof, was admissible.

—Jefferson Hotel Co. v. Warren, 128 Fed. 565.....63 C. C. A. 193

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSOLVENCY.

See "Bankruptcy."

Debts due United States, see "United States," § 1.

Of corporation, see "Corporations," § 4.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," § 2.

In criminal prosecutions, see "Criminal Law," § 2.

INSURANCE.

Cancellation of policy, see "Cancellation of Instruments," § 1.

§ 1. Insurable interest.

The charterer of a steamship has an insurable interest in goods in his possession as carrier to the full extent of their value against a loss for which it is possible that he may become responsible, and the question whether he has a right to recover on the policy is not to be determined after the loss by inquiring whether he is in fact then liable to the owners on account of such loss.

—Munich Assur. Co. v. Dodwell & Co., 128 Fed. 410..63 C. C. A. 152

§ 2. The contract in general.

An English valued policy on a ship contained the provision: "General average salvage, and special charges as per foreign custom, payable according to foreign statements, * * * or per rules of port of discharge. * * * at the option of assured." *Held*, that under such provision the law of New York, the port of discharge, governed as to the amount payable by the insurer on account of salvage arising from stranding, there adjusted, and the insured was entitled to recover on the policy, in accordance

with the law of the port, a sum which bears the same ratio to the entire salvage he was compelled to pay as the amount of the policy bears to the policy value of the ship, although the award was made on a higher valuation, and not, as by the law of England, only such part of said sum as bears the same ratio to the whole as the policy valuation bears to the valuation on which the adjustment was made.

—*International Nav. Co. v. Sea Ins. Co.*, 129 Fed. 13..63 C. C. A. 663

§ 3. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Defendant issued life insurance policies, which were delivered on receipt of a year's premiums. They provided that they might be renewed from year to year by the payment of similar premiums within the days of grace allowed after the expiration of each year. After some years the insured wrote from Mexico asking defendant whether it had an agent there to whom a renewal premium could be paid, and, if not, to whom it could be sent, and received an answer that it might be sent to New York "by check, draft, or money order payable to the order of the company." Insured purchased a New York draft from a reputable bank in Mexico, payable to defendant's order, and mailed it to defendant, which received it before the expiration of the year, sent the insured renewal receipts for another year, and deposited the draft for collection. Subsequently, but before the draft was paid, the drawer bank suspended, and it was not paid. Defendant demanded the return of its renewal receipts, and, not receiving them nor further payment, declared the policies canceled, and refused to accept a renewal premium tendered a year later. *Held*, that the draft was not sent in payment of any indebtedness from the insured to defendant, the insured purchasing renewed insurance each year for cash; that having purchased a draft for the amount of a year's renewal premiums, payable to defendant and not indorsed by him, in accordance with defendant's instructions, which it received and accepted in payment for such renewed insurance before the suspension of the bank which issued it, defendant could not charge the loss thereon to the insured, and cancel his policies as for nonpayment of the premium.

—*MacMahon v. United States Life Ins. Co.*, 128 Fed. 388.....
63 C. C. A. 130

§ 4. Extent of loss and liability of insurer.

A marine policy issued to the charterer of a steamship insuring the cargo against general average charges, "as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all," is to be construed as covering the entire cargo in the vessel, whether owned by the charterer or by others, and the charterer is entitled to recover thereon the full amount of general average charges apportioned against the cargo.

—*Munich Assur. Co. v. Dodwell & Co.*, 128 Fed. 410..63 C. C. A. 152

§ 5. Adjustment of loss.

Where a fire insurance policy provided that in the event of a disagreement as to the amount of the loss the loss should be ascertained by appraisers, and after loss an agreement was made, in which the only thing submitted to arbitration was the extent of the damage, the insurer's liability being expressly reserved, such arbitration agreement was no bar to insured's right of action on the policy.

—*British America Assur. Co. v. Darragh*, 128 Fed. 890.....
63 C. C. A. 426

Where a fire policy provided for arbitration only in the event of a disagreement as to the amount of the loss, and after loss, but before there had been any attempt to agree on the amount thereof, it was agreed to submit the amount of the loss to arbitration, such agreement was a substantial departure from and independent of the policy, and avoided the effect of the policy provision.

—*British America Assur. Co. v. Darragh*, 128 Fed. 890.....
63 C. C. A. 426

Where an umpire was appointed to determine disagreements between arbitrators appointed to determine an insurance loss, such appointment was a personal trust, and it was therefore improper for him to base his conclusions on facts reported to him by one of his employés.

—British America Assur. Co. v. Darragh, 128 Fed. 890.....
63 C. C. A. 426

Where, after loss under a policy, and before any disagreement as to the amount thereof, the parties agreed to submit the loss to arbitration, and two arbitrators were appointed, but the arbitration failed by reason of the withdrawal of insured's arbitrator because of the failure of the arbitrator appointed by insurer to act with reasonable dispatch, and insurer failed to object to such withdrawal, it was estopped from thereafter insisting that insured was barred by such abortive arbitration from suing on the policy.

—British America Assur. Co. v. Darragh, 128 Fed. 890.....
63 C. C. A. 426

§ 6. Mutual benefit insurance.

A member of a fraternal insurance association, which passed an invalid by-law attempting to arbitrarily reduce the amount payable on the certificates of its members on their death, did not assent to such reduction, nor preclude the beneficiary from recovering the full amount named in his certificate on his death, by paying the reduced assessments after notice of the adoption of the by-law, where the association refused to receive any larger payments, and where, on making the first payment, he notified the association by letter that he did not ratify or consent to the reduction.

—Supreme Council A. L. H. v. Champe, 127 Fed. 541.. 63 C. C. A. 282

Where a fraternal insurance association passed an invalid by-law, at tempting to arbitrarily reduce the amount payable on the certificates of its deceased members on their death, a letter, written by the secretary of the association to a collector after the by-law went into effect, advising him that the association would not receive assessments in excess of those made under such by-law, and directing him to return the excess which he had accepted from certain members, was admissible in evidence to show the association's position, and to excuse the failure of deceased to tender amounts in excess of the assessments required under the by-law.

—Supreme Council A. L. H. v. Champe, 127 Fed. 541.. 63 C. C. A. 282

INTEREST.

Insurable interest, see "Insurance," § 1.

On shares in corporation, see "Corporations," § 1.

INTERIOR DEPARTMENT.

See "Public Lands," § 2.

INTERNAL REVENUE.

Examination of witnesses in proceeding to condemn vessel for violating revenue law, see "Witnesses," § 1.

Where an information for the forfeiture of certain packages of liquors alleged that, after the barrels had been inspected, gauged, and stamped, something else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked, to wit, distilled spirits of a different quality, had been placed therein, in violation of Rev. St. § 3455 [U. S. Comp. St. 1901, p. 2279], evidence that at the time the proof of the liquors was reduced by the addition of water, after the packages had been stamped, some caramel coloring matter had

been put into the packages to deepen the color, was not within the information, and therefore inadmissible.

—Three Packages of Distilled Spirits v. United States, 129 Fed. 329..
63 C. C. A. 263

Where, on an information to forfeit certain liquors on the ground that distilled spirits of a different quality had been put into the barrels after they were originally stamped and branded, in violation of Rev. St. § 3455 [U. S. Comp. St. 1901, p. 2279], it was conceded that the claimant was entitled to reduce the proof by the addition of water, and the uncontradicted evidence showed that the spirits contained in the packages had been reduced in proof between 12 and 14 degrees, after they had been gauged and stamped, by the addition of water, in conformity with the law and in the presence of a government gauger, the discrepancy in the percentage of the alcohol contained in the liquor was insufficient to form a basis for an inference that the change was occasioned by the addition of "other spirits of a different quality."

—Three Packages of Distilled Spirits v. United States, 129 Fed. 329..

63 C. C. A. 263

In a proceeding for the forfeiture of a vessel for violating the internal revenue laws, in transporting and concealing intoxicating liquors, evidence held to justify a finding that the liquor concealed was manufactured in Hawaii subsequent to the taking effect in that territory of the revenue laws of the United States.

—The Kawaiiani, 128 Fed. 879.....63 C. C. A. 347

INTERNATIONAL LAW.

See "Aliens."

INTERSTATE EXTRADITION.

See "Extradition," § 1.

INTOXICATING LIQUORS.

Judicial notice of intoxicating quality, see "Evidence," § 1.

INVENTION.

See "Patents."

JOINDER.

Of causes of action for death, see "Death," § 1.

Of parties, see "Parties," § 1.

JUDGES.

See "Courts."

JUDGMENT.

Review, see "Appeal and Error"; "Courts," § 3.

§ 1. On trial of issues.

A judgment for damages in a sum greater than is alleged or prayed for in the complaint cannot be sustained, although it may be supported by the evidence.

—Brought v. Cherokee Nation, 129 Fed. 192.....63 C. C. A. 350

§ 2. Equitable relief.

The undisputed evidence adduced in an action at law in support of a set-off claiming damages for breach of a contract for a sale of logs to defendant *held*, under the instructions of the court as to the measure of damages, to have established definitely and certainly the amount of the damages to which the defendant was entitled as a set-off, for the purpose of a subsequent suit in equity by such defendant to have the judgment corrected on the ground that a clerical mistake was made by the court in computing the amount of such set-off, in requiring a remittitur of the amount thereof from the judgment for plaintiff.

—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 343 63 C. C. A. 73

§ 3. Foreign judgments.

Where a state court determined, either as a question of law or fact, that a suit therein to enforce the statutory liability of a stockholder of a corporation of another state could not be maintained under the laws of the latter state, which, as construed by its Supreme Court, gave a right of action only to the creditors as a body against the stockholders as a body, and thereupon dismissed the action on the merits, its judgment was conclusive on the parties, and a second action by the same complainant against the same defendant on the identical cause of action cannot be maintained in a federal court.

—*Eau Claire Nat. Bank v. Benson*, 128 Fed. 277.... 63 C. C. A. 591

§ 4. Payment, satisfaction, merger, and discharge.

The assignment of a demand in suit by the plaintiff to his attorney, who has a statutory lien thereon, prevents the accruing of any right to the defendant to set-off, against a judgment subsequently rendered thereon, a judgment previously recovered against the plaintiff.

—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 332 63 C. C. A. 62

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JURISDICTION.

Amount in controversy, see "Courts," § 3.

In admiralty, see "Admiralty," § 1.

Of land department, see "Public Lands," § 2.

Of particular courts, see "Courts."

Of proceedings for naturalization, see "Aliens," § 3.

JURY.

Instructions in civil actions, see "Trial."

Instructions in criminal prosecutions, see "Criminal Law," § 3.

Procedure in federal courts as affected by state laws, see "Courts," § 3.

Taking case or question from jury at trial, see "Trial," § 1.

§ 1. Competency of jurors, challenges, and objections.

Where, in a criminal prosecution in the federal courts, there was a dispute between counsel, while the jury was being impaneled, as to the order in which their respective peremptory challenges should be used, but neither counsel called the court's attention to it, and the United States attorney reserved one of his challenges until after talesmen had been drawn, it was not error to permit the government's attorney to exercise such challenge after defendant's challenges had been exhausted.

—*Radford v. United States*, 129 Fed. 49..... 63 C. C. A. 491

LACHES.

Effect in equity, see "Equity," § 2.

LAND DISTRICT.

See "Public Lands," § 1.

LANDLORD AND TENANT.

Mining leases, see "Mines and Minerals," § 1.

§ 1. Terms for years.

Complainant rented a storeroom, which constituted a part of a hotel, under a lease containing an option for renewal. Thereafter the entire hotel was leased to defendant, under a lease which expressly provided that it was subject to the existing lease on the store; the tenant attorning and paying rent to become due for the same to defendant, its successors and assigns. Complainant's lease was filed for record 4½ months after defendant's lease of the hotel was recorded, and defendant, without making any inquiry as to the covenants in complainant's lease, or examining the record, continued to accept rent from complainant for more than a year after complainant's lease was recorded. *Held*, that the clause in defendant's lease of the hotel, referring to complainant's lease, was a limitation of defendant's grant, and the estoppel created by such clause, and confirmed by defendant's conduct in accepting rent from complainant after record of its lease, precluded defendant from denying complainant's right to exercise its option to renew.

—A. G. Corre Hotel Co. v. Wells-Fargo Co., 128 Fed. 587.....
63 C. C. A. 23

Where a lessor, with knowledge that her lessees had assigned the lease in violation of a covenant against such assignment, conducted various correspondence with the assignee, and treated it as her tenant, and made no objection until after the lessees had changed their position to their prejudice, and deprived themselves of the ability to perform an option of renewal contained in the lease, the lessor was estopped to deny that she had consented to such assignment.

—Warner v. Cochrane, 128 Fed. 553.....63 C. C. A. 207

Where an assignment of a lease containing a covenant of renewal was valid as against the lessor, a demand for such renewal was properly made by the assignee to whom such covenant to renew passed by the assignment.

—Warner v. Cochrane, 128 Fed. 553.....63 C. C. A. 207

LAND OFFICE.

See "Public Lands," § 2.

LANDS.

See "Public Lands."

LARCENY.

From mails, see "Post Office," § 2.
Name in indictment, see "Names."

LEASES.

See "Landlord and Tenant."

LEGISLATION.

Enactment and validity of statutes, see "Statutes," § 1.

LETTER CARRIERS.

See "Post Office," § 1.

LETTERS.

Secondary evidence, see "Evidence," § 2.

LETTERS PATENT.

For inventions, see "Patents."

For public lands, see "Public Lands," § 2.

LIBEL.

In admiralty, see "Admiralty," § 2.

LIBEL AND SLANDER.

§ 1. Actions.

In a libel suit it is not error to admit evidence of plaintiff's general social and business standing.

—Morning Journal Ass'n v. Duke, 128 Fed. 657.....63 C. C. A. 459

Where, in a suit for publishing a libelous newspaper article, plaintiff seeks to recover exemplary damages by showing that the publication was wanton and reckless, and defendant has been permitted fully to show every particle of information relied on by its reporter when he wrote the article, and the documents which the reporter received from a third person are all admitted, and both he and such third person testify fully as to everything that passed between them, it is not error to exclude evidence of an investigation made by such third person, but of which defendant or its agents were not informed when the article was written and its publication determined on.

—Morning Journal Ass'n v. Duke, 128 Fed. 657.....63 C. C. A. 459

A libelous article appeared with headlines as follows: "Murdered Many for Insurance. Agent Here to Probe into a Horrible Conspiracy. Half a Dozen in It. Most Prominent Business Men of S. Incriminated." Smaller headlines announced the amount of money made by the plotters; that New York insurance companies were selected to be victimized; and that policies were taken on invalids, and when they did not die quickly enough they were poisoned. Below these headlines a panel was formed by a border of stars, making it specially prominent, in which under the title "The Conspirators" six persons were mentioned, including plaintiff. In another panel were given the number of those who died by disease and by poison, and whose lives were attempted, etc. Subheadings distributed through the article read: "How Suspicion was Aroused;" "Had been Killed by Strychnine;" "L. Sentenced to Death;" "Supreme Court Judge Aids J.;" "Given Poison in Whiskey," etc. The narrative in small type fairly imported as a whole that plaintiff was a member of the conspiracy and one of the beneficiaries who profited by the frequent mysterious deaths, which had been brought about by poison, though it directly charged him only with fraudulently issuing policies on bad risks. *Held*, that it was not error to charge as a matter of law that the article imputed to

plaintiff the crime of being one of several conspirators who had engaged in obtaining fraudulent insurance upon the lives of decrepit and infirm persons whose death, when disease failed, had been brought about by poison.

—Morning Journal Ass'n v. Duke, 128 Fed. 657.....63 C. C. A. 459

In a suit for publishing a libelous article charging plaintiff with being a conspirator in a scheme to fraudulently issue insurance policies on the lives of decrepit and infirm persons, and, where they did not die quickly enough, to poison them, it is proper to instruct that if the libel charges plaintiff with murder it is neither a defense nor a mitigation of damages to prove that he was guilty of fraud.

—Morning Journal Ass'n v. Duke, 128 Fed. 657.....63 C. C. A. 459

LICENSES.

For mining, see "Mines and Minerals," § 1.

LIENS.

See "Mechanics' Liens"; "Railroads," § 2.

LIFE INSURANCE.

See "Insurance," § 3.

LIMITATION OF ACTIONS.

Laches, see "Equity," § 2.

LIS PENDENS.

In a suit under section 3 of Act June 28, 1898 (30 Stat. 495, c. 517), which authorizes a suit by a tribe in the Indian Territory to recover lands held by those claiming membership in the tribe, but whose membership or right has been disallowed by the commission or the United States court, and the judgment has become final, the general rule applies that a stranger cannot, by a conveyance or transfer of possession from the defendant pendente lite, acquire any rights which are not subject to the judgment subsequently rendered in the suit, whether or not he is made a party thereto; and where such a purchaser or transferee is brought in by an amended complaint it is not necessary to allege that his membership in the tribe has been disallowed.

—Hargrove v. Cherokee Nation, 129 Fed. 186.....63 C. C. A. 276

A purchaser of mining property, including the shafts, machinery, and workings thereon, pending a suit against the grantor involving the alleged extension of such workings into adjoining property, is bound by an order subsequently made by the court in such suit permitting the adverse party to inspect and survey the mine.

—Heinze v. Butte & B. Consol. Min. Co., 129 Fed. 274.....
63 C. C. A. 388

MALICIOUS PROSECUTION.

See "False Imprisonment."

MANDAMUS.

§ 1. Jurisdiction, proceedings, and relief.

A judgment for defendant in a Circuit Court was reversed on a writ of error, and the cause remanded with directions to award a new trial and
63 C.C.A.—47

to issue execution against the defendant for the costs of the appellate court. The Circuit Court, without sufficient cause, granted a stay of execution, and also erroneously sustained a plea in the nature of a plea in abatement filed by defendant, but without entering any final order or judgment in the case from which a writ of error would lie. Plaintiff applied to the Circuit Court of Appeals for a writ of mandamus to compel the Circuit Court to set aside the staying order and to proceed with the new trial. *Held* that, the remedy by mandamus being undoubtedly appropriate to enforce obedience to the court's mandate for execution, and the court having the full record before it relating to the ruling on the plea, it would treat the proceeding as in effect one on a writ of error, and deal with the whole case, instead of compelling the plaintiff to await the future action of the Circuit Court, and to again bring up the same record by writ of error.

—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 332 63 C. C. A. 62

MANDATE.

See "Mandamus."

MARINE INSURANCE.

See "Insurance," §§ 2, 4.

MARITIME LAW.

Judicial notice, see "Evidence," § 1.

MARRIED WOMEN.

Adjudication of bankruptcy, see "Bankruptcy," § 1.

MASTER AND SERVANT.

Employment of pilots, see "Pilots."

§ 1. Master's liability for injuries to servant.

A railroad company accustomed to keep its guard rails blocked permitted the block to disappear from one of them. A brakeman, in ignorance that the block had disappeared, after trying to couple two moving cars by means of a lever on his side of the train, failed to use or to try to use the lever on the other side of the train, which had been furnished for the same purpose, entered between the ends of the cars, uncoupled them without the use of the lever, caught his foot between the guard rail and the main rail, and was injured. *Held*, conceding, but not deciding, that the company was negligent in permitting the guard rail to become unblocked, the plaintiff failed to exercise ordinary care; his failure directly contributed to his injury, and was fatal to his action for damages on account of it.

—*Gilbert v. Burlington, C. R. & N. Ry. Co.*, 128 Fed. 529 63 C. C. A. 27

The act of March 2, 1893, c. 196, 27 Stat. 531 [3 U. S. Comp. St. 1901, p. 3174], which makes it the duty of common carriers to equip their cars engaged in interstate traffic with couplers which can be uncoupled "without the necessity of men going between the ends of the cars," imposes upon the employes the correlative duty of using these couplers when furnished, and of refraining from unnecessarily going between the ends of cars to uncouple them. A failure of a servant to discharge this duty, which

directly contributes to his injury, is fatal to an action for damages on account of it.

—*Gilbert v. Burlington, C. R. & N. Ry. Co.*, 128 Fed. 529.....
63 C. C. A. 27

Where there is a comparatively safe and a more dangerous way of discharging a duty known to a servant, it is negligence for him to select the more dangerous method, and, if his selection directly contributes to his injury, it is fatal to his recovery therefor.

—*Gilbert v. Burlington, C. R. & N. Ry. Co.*, 128 Fed. 529.....
63 C. C. A. 27

Where, in an action for injuries to a Pullman porter in a railroad wreck, whether he was injured at all in the wreck was in issue, and the evidence thereon was strongly conflicting, defendant was entitled to a charge that the burden was on plaintiff to establish by a preponderance of the evidence, to the jury's satisfaction, the derailment of the train on which plaintiff was serving as a porter, and that he was injured in the manner alleged in his petition, and that if he had failed to so establish either of such propositions as alleged he could not recover.

—*Mexican Nat. R. Co. v. Palmer*, 128 Fed. 407.....63 C. C. A. 149

Such instruction was not covered by a charge that the accident was alleged to have happened at a particular point on defendant's road; that plaintiff in his petition claimed that the derailment of the coach in which he was riding was caused by defendant's negligence in running the train at an excessive and dangerous rate of speed, and by the defective condition of defendant's track at the point where the accident occurred; that if plaintiff's injuries resulted from either of these causes, or both combined, defendant would be liable; and that the burden was on plaintiff to prove his case as alleged; together with a subsequent charge that in civil cases, like the present, the jury were entitled to predicate their finding on a preponderance of the evidence.

—*Mexican Nat. R. Co. v. Palmer*, 128 Fed. 407.....63 C. C. A. 149

A firm of stevedores contracted to discharge and load a vessel, being required to furnish all labor and appliances, except that the ship was to furnish winches and winchmen. Plaintiff, a servant of the stevedores, was injured by the negligence of the winchman in failing to obey an order to reverse the winch. *Held*, that the winchman, not being under the control of the stevedores, was not plaintiff's fellow servant, so as to preclude plaintiff from recovering for his negligence.

—*The Gladestry*, 128 Fed. 591.....63 C. C. A. 198

In an action for injuries to a seaman by the breaking of a mast, caused by its being struck by a bucket of ore negligently swung from the hold by stevedores engaged in unloading a vessel, whether it was the erratic movement of the bucket which caused the accident, or whether the derrick engineer was negligent in attempting to swing the bucket from the hatch to the dock while such movement was going on, was for the jury.

—*Robinson v. Pittsburg Coal Co.*, 129 Fed. 324.....63 C. C. A. 258

Where a seaman was injured by the falling of a mast, caused by its being struck by a bucket of ore being hoisted from the hold by a derrick engineer employed by a different master from the owner of the vessel, the seaman and the derrick engineer were not fellow servants.

—*Robinson v. Pittsburg Coal Co.*, 129 Fed. 324.....63 C. C. A. 258

Where a seaman was killed by the falling of a mast after it was struck by a bucket of ore negligently hoisted from the hold of the vessel by an engineer employed by another master to unload the vessel, in the absence of proof that the mast was not sufficiently strong to stand all the uses for which it was designed, and, if it had been entirely sound, it would have sustained, without breaking, the strain put upon it by the

blow from the loaded bucket, the fact that the mast had become decayed was not a proximate cause of the accident.

—*Robinson v. Pittsburg Coal Co.*, 129 Fed. 324.....63 C. C. A. 258

Plaintiff, a skilled switchman, was injured while attempting to couple two cars equipped with link and pin couplings, with which he was perfectly familiar. The engineer was under his direction at the time, and backed the train so slowly that it barely moved. Plaintiff took hold of the link of the approaching car with his left hand to guide it, and, having done so, left his hand between the drawheads until his fingers were crushed by the impact. *Held*, that under the particular facts appearing in the case the plaintiff was guilty of contributory negligence as a matter of law.

—*Denver & R. G. R. Co. v. Arrighi*, 129 Fed. 347..63 C. C. A. 649

Act March 2, 1893, c. 196, § 8, 27 Stat. 532 [3 U. S. Comp. St. 1901, p. 3176], providing that any employé of any interstate carrier who may be injured by any car used in interstate traffic by reason of the same not having been equipped with an automatic coupler device coupling by impact shall not be deemed to have assumed the risk thereby occasioned, though continuing in the employment of the carrier after the unlawful use of the car had been brought to his knowledge, did not relieve an employé injured by a car not so equipped from liability for his own contributory negligence.

—*Denver & R. G. R. Co. v. Arrighi*, 129 Fed. 347..63 C. C. A. 649

MECHANICS' LIENS.

§ 1. Waiver, discharge, release, and satisfaction.

The fact that the owner pays a building contractor the per cent. of the contract price which, under the contract, should have been reserved till the completion of the building, does not release a surety on the contractor's bond, given to secure prompt performance of the work, and also the moneys due laborers and materialmen, from liability to the laborers or materialmen.

—*Chaffee v. United States Fidelity & Guaranty Co.*, 128 Fed. 918....
63 C. C. A. 644

An extension of time to a contractor by a materialman, who might in the first instance have fixed the time of the maturity of his claim without the knowledge or consent of a surety on the contractor's bond given to secure moneys due laborers and materialmen, does not release such surety.

—*Chaffee v. United States Fidelity & Guaranty Co.*, 128 Fed. 918....
63 C. C. A. 644

A materialman does not discharge a surety on the contractor's bond, given to secure moneys due laborers and materialmen, by receiving acceptances from the contractor, and thereby extending the time of payment, where the acceptances have not been paid, and it does not appear that the contractor was solvent when they were made and insolvent when they were due, or that the extension resulted in loss or injury to the surety.

—*Chaffee v. United States Fidelity & Guaranty Co.*, 128 Fed. 918....
63 C. C. A. 644

MINES AND MINERALS.

Purchase pending suit, see "Lis Pendens."

§ 1. Title, conveyances, and contracts.

Where a lease of asphalt land provided for a renewal concurrently on the payment by the lessees of a sum equal to the difference between the royalty paid and that which would be payable on a specified number of tons of asphalt, and the lessor wrongfully refused to make such renewals the lessees or their assignees were at liberty either to tender such differ-

ential rent and insist on specific performance of the covenant to renew, or refuse payment, and treat the contract as at an end.

—Warner v. Cochrane, 128 Fed. 553.....63 C. C. A. 207

A lease of asphalt land provided that if, on or before July 1, 1900, the lessees should not have paid royalty on 34,000 tons of asphalt at the rate fixed, they should pay to the lessor on such day royalty equal to the difference between the royalty paid and that payable on that number of tons, and if at that time the lessees should have performed all the conditions contained in the lease, the lessor covenanted to renew the lease at the lessees' option. *Held*, that the conditions for renewal and payment were concurrent, and the lessor, having refused to renew, was not entitled to recover the differential payment provided for.

—Warner v. Cochrane, 128 Fed. 553.....63 C. C. A. 207

MORTGAGES.

Of personal property, see "Chattel Mortgages."

Railroad mortgages, see "Railroads," § 2.

MOTIONS.

Direction of verdict in civil actions, see "Trial," § 1.

New trial in criminal prosecutions, see "Criminal Law," § 4.

Quashing indictment or information, see "Indictment and Information," § 1.

MUNICIPAL CORPORATIONS.

See "Counties."

Estoppel against, see "Estoppel," § 1.

Street railroads, see "Street Railroads."

Use of land belonging to, for wharves, as divesting of ownership, see "Navigable Waters," § 1.

§ 1. Fiscal management, public debt, securities, and taxation.

Where there was statutory authority for a county to issue negotiable bonds, and it has issued such bonds, which have passed into the hands of bona fide purchasers for value, the county is estopped by recitals therein that they were issued in all respects in conformity to the statutes authorizing the same.

—Board of Com'rs of Henderson County v. Travelers' Ins. Co., 128 Fed. 817.....63 C. C. A. 467

MUTUAL BENEFIT INSURANCE.

See "Insurance."

NAMES.

A person's middle name is not recognized in law, and the omission of the initial letter of such name in a warrant of arrest, or a mistake therein, is immaterial.

—Cox v. Durham, 128 Fed. 870.....63 C. C. A. 338

Where an indictment charged defendant with extracting from the mails, embezzling, and stealing the contents of a package addressed to "L. Krowder," evidence that the package was addressed to "L. Krower" did not constitute a variance, such names being *idem sonans*.

—Alexis v. United States, 129 Fed. 60.....63 C. C. A. 502

NATURALIZATION.

See "Aliens," § 3.

NAVIGABLE WATERS.

§ 1. Lands under water.

The state of Alabama, when admitted into the Union, acquired by the compact the title to the soil below high-water mark under the navigable waters within the limits of the state which had not been previously granted.

—City of Mobile v. Sullivan Timber Co., 129 Fed. 298.....
63 C. C. A. 412

By Act Ala. Jan. 31, 1867 (Laws 1866-67, p. 307), granting to the city of Mobile so much of the shore and soil under the Mobile river as was within the city's boundaries, the city acquired title to the land so conveyed as trustee for the public, and could not convey the same for the benefit of riparian proprietors.

—City of Mobile v. Sullivan Timber Co., 129 Fed. 298.....
63 C. C. A. 412

Where a city held the title to the land under a navigable river within the city's limits below high-water mark in trust for the public, a custom under which riparian proprietors used the land for the erection of wharves, etc., was not available to support a contention that the city had thereby been divested of its title to the land.

—City of Mobile v. Sullivan Timber Co., 129 Fed. 298.....
63 C. C. A. 412

NEGLIGENCE.

See "Collision."

Causing death, see "Death," § 1.

Failure to care for injured seamen, see "Seamen."

By particular classes of parties.

See "Carriers," § 1.

Employers, see "Master and Servant," § 1.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Condition or use of particular species of property, works, or machinery.

See "Explosives."

Tugs, see "Towage."

Contributory negligence.

Of passenger, see "Carriers," § 1.

Of servant, see "Master and Servant," § 1.

§ 1. Contributory negligence.

The test of contributory negligence is whether or not the want of care directly contributes to the injury, not whether or not it is a more proximate cause of it than the negligence of the defendant. If it directly contributes to the injury, it is fatal to the plaintiff's recovery, although the negligence of the defendant may be the more proximate cause of it.

—Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529.....
63 C. C. A. 47

One who voluntarily and unnecessarily exposes himself to an imminent known danger, and thereby directly contributes to his injury, cannot escape the fatal effect of his contributory negligence because the unknown

negligence of the defendant, which concurred to produce the injury, made the danger greater than he supposed it to be.

—Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529.....
63 C. C. A. 27

§ 2. Actions.

While the questions of contributory negligence and proximate cause are, like other questions of fact, ordinarily for the jury, they are for the court where there is no substantial conflict in the evidence, and the conclusions from it are such that all reasonable men must agree upon them.

—Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529.....
63 C. C. A. 27

Defendants were contractors engaged in the construction of locks for the government at the Cascades in the Columbia river, and in the course of the work were doing blasting. A steamer used a landing on the reserved premises on its daily trips, and remained there for some time. While so lying with some passengers on board, and others passing to and from the boat, defendants fired a blast at a distance of 150 to 200 feet from the landing, and a piece of rock struck and injured plaintiff, who was in the boat. Plaintiff testified that he heard blasting some time before, but thought it was at a greater distance. *Held*, that while defendants had a right to continue the prosecution of their work, and passengers on the boat or premises assumed all risks necessarily incident thereto if conducted with skill and reasonable care, whether or not defendants exercised such skill and care, these being evidence tending to show that they gave no notice to the boat passengers that a blast was about to be fired, and whether plaintiff was guilty of contributory negligence, were questions of fact to be determined by the jury under all the evidence.

—Smith v. Day, 128 Fed. 561.....63 C. C. A. 189

In the federal courts the burden is on the defendant to prove contributory negligence alleged as a defense by the preponderance of the evidence.

—Jefferson Hotel Co. v. Warren, 128 Fed. 565.....63 C. C. A. 193

The question whether or not one is guilty of contributory negligence is ordinarily for the jury. It is only when the facts which condition the question are stipulated, or are established by testimony which is free from substantial conflict, and the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it, that the question of contributory negligence may be lawfully withdrawn from the jury.

—Cary Bros. & Hannon v. Morrison, 129 Fed. 177..63 C. C. A. 287

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 4.

Mandamus to compel, see "Mandamus," § 1.

NOTICE.

Of particular facts, acts, or proceedings.

See "Lis Pendens."

Assignment of patents, see "Patents," § 2.

Delay in sending telegram, see "Telegraphs and Telephones," § 1.

Sale of land, see "Vendor and Purchaser," § 2.

OBSTRUCTIONS.

Of easements, see "Easements," § 1.

OFFICERS.

Particular classes of officers.

See "Receivers"; "Sheriffs and Constables."

Corporate officers, see "Corporations," § 3.

Letter carriers, see "Post Office," § 1.

OPENING.

Reopening estate of bankrupt, see "Bankruptcy," § 2.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 6.

OPTIONS.

To purchase land, see "Vendor and Purchaser," § 1.

ORDERS.

Review of appealable orders, see "Appeal and Error."

PAROL EVIDENCE.

In civil actions, see "Evidence," § 5.

PARTIES.

In actions by or against Indians, see "Indians."

In actions by or against trustees in bankruptcy, see "Bankruptcy," § 2.

In action to restrain interference with easement, see "Easements," § 1.

Parties entitled to allege error, see "Criminal Law," § 5.

To release, see "Release," § 1.

Transfer of interest ground for abatement, see "Abatement and Revival," § 1.

§ 1. Defects, objections, and amendment.

Under Mansf. Dig. Ark. §§ 5028, 5031, extended to Indian Territory, providing that a nonjoinder or defect of parties, where the objection is not raised by demurrer to the complaint or by answer, is waived, the right of a plaintiff to recover the value of property converted by defendant cannot be contested on the trial on the ground that the property was owned by plaintiff and a third person in partnership, and especially where such third person testified in plaintiff's behalf, and is thereby estopped to assert any interest in the property as against defendant.

—Gentry v. Singleton, 128 Fed. 679.....63 C. C. A. 231

PARTITION.

§ 1. Actions for partition.

Where a proceeding for partition is one at law, in which questions of title may be tried, as it appears to be under the law of Texas, on the trial of such an action in a federal court the legal title must prevail.

—Lee v. Wysong, 128 Fed. 833.....63 C. C. A. 483

PARTNERSHIP.

§ 1. The relation.

A mere employé engaged to render service in conducting a business, although he is to receive a share of the profits as compensation for his services, is in no sense a partner, and has no power to sell property of his employers, where he has never been held out by them as having such authority.

—Gentry v. Singleton, 128 Fed. 679.....63 C. C. A. 231

§ 2. The firm, its name, powers, and property.

Where the members of a firm conveyed land to a city, to be used as a public burying ground forever, a bill by the legal representatives of the members of such firm to recover the land on the ground that its use had been illegally changed, which failed to show that plaintiffs were entitled to the reversion, or that they had any interest or right in the further carrying out of the purpose of the grant, was demurrable.

—Thornton v. City of Natchez, 129 Fed. 84.....63 C. C. A. 526

PART PAYMENT.

Within statute of frauds, see "Frauds, Statute of," § 1.

PASSENGERS.

See "Carriers," § 1.

Regulation of street railroads as to allowing passengers to enter trains at stations, see "Street Railroads," § 1.

PATENTS.

For public lands, see "Public Lands," § 2.

§ 1. Patentability.

It is not necessary to a valid combination that all the parts should cooperate all the time, but it is enough that in the normal and progressive use of the machine they do so some of the time.

—Sanders v. Hancock, 128 Fed. 424.....63 C. C. A. 166

The fact that an expert, with a patent before him, might be able to build up the structure covered thereby, by selecting and adapting appliances theretofore known, does not overcome the presumption of invention arising from the granting of the patent, where neither the same combination in its entirety nor the same mode of operation had previously been described or known.

—McMichael & Wildman Mfg. Co. v. Ruth, 128 Fed. 706.....
63 C. C. A. 304

§ 2. Persons entitled to patents.

An instrument which does not purport to convey any present interest in an existing patent, or one for which an application is pending, is not an "assignment, grant, or conveyance," within the meaning of Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387], and its registration does not operate as constructive notice to an assignee of a patent subsequently applied for, and granted to the person executing the same.

—National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114; Same v. Hallwood Cash Register Co., Id. 63 C. C. A. 616

Where the attorney for an inventor, having been requested by complainant to ascertain whether his client would sell a pending application

for a patent, bought such application himself, without disclosing the fact that he was acting for any one else, and then resold and assigned the same to complainant for more than double the price he paid, complainant was not affected by his knowledge that others had an equitable interest therein.

—National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114; Same v. Hallwood Cash Register Co., Id...63 C. C. A. 616

Evidence of a fraudulent purpose, or conduct amounting to moral turpitude, is not necessary to deprive a purchaser of a legal title of the advantage of his position. If he is shown to have been aware of such facts as to put a reasonably prudent man upon inquiry, he is chargeable with all the facts which would have been developed if inquiry had been prosecuted with reasonable diligence.

—National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114; Same v. Hallwood Cash Register Co., Id...63 C. C. A. 616

Complainant purchased and took an assignment of an application for a patent which had been pending in the Patent Office for some four years. Six months before the filing of such application, complainant had been in negotiation with the applicant and two other persons for the purchase of prior patents for inventions made by him relating to the same kind of machines, and issued to the three, and was then informed of an agreement between them by which, so long as it continued in force, the other two persons furnished the capital necessary to perfect and patent all inventions made by the inventor relating to such subject-matter, and were to have an equal interest in the patents therefor. In fact, the application bought by complainant covered an invention made under such agreement, and the two persons who furnished the capital were each the equitable owners of a third interest therein. *Held*, that the facts were such as to put complainant on inquiry, and to charge it with notice of all that might have been learned by such inquiry prosecuted with reasonable diligence, and that it did not acquire a title to the patent subsequently issued which would support a suit for its infringement.

—National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114; Same v. Hallwood Cash Register Co., Id...63 C. C. A. 616

§ 3. Applications, and proceedings thereon.

It is not essential to the validity of a patent to insert in the drawings and specification a description of every detail. It is sufficient if the description is such as to enable a mechanic skilled in the art to construct the device patented.

—American Delinter Co. v. American Machinery & Construction Co. 128 Fed. 709.....63 C. C. A. 307

A patent for a machine for delinting cotton-seed, which shows that the seed is to be fed into the machine at one end and discharged at the other, is not invalidated by the failure to specify or show in the drawings a feed screw or other device for assisting to move the seed through the machine; the machine being operative without it, but it being obvious that some such device would aid the passage of the seed through the machine, and when in fact it was used in the construction of the first machine.

—American Delinter Co. v. American Machinery & Construction Co. 128 Fed. 709.....63 C. C. A. 307

§ 4. Construction and operation of letters patent.

An element of a combination, although not definitely described in the claims, except by reference to the specification by the words "substantially as described" at the end of each claim, may be read into the claims, where it is fully described in the specification, and is essential to the operation of the machine.

—Sanders v. Hancock, 128 Fed. 424.....63 C. C. A. 166

§ 5. Infringement.

An order granting a preliminary injunction against infringement, or requiring the defendant in the alternative to give a bond, where such bond

has been given, so that defendant's business is not disturbed, will not be reviewed on the merits on appeal in advance of the hearing on full proofs.

—United Blue-Flame Oil Stove Co. v. Silver & Co., 128 Fed. 925.....
63 C. C. A. 110

An executory agreement by patentees to transfer to a third person an interest in patents not identified therein does not operate as an assignment, and cannot be set up by defendants to impeach the title of an assignee of the patent in a suit for its infringement, to which such third person is not a party.

—McMichael & Wildman Mfg. Co. v. Ruth, 128 Fed. 706.....
63 C. C. A. 304

Pleas to a bill in equity for infringement of a patent which in effect admit infringement up to a date a short time prior to the filing of the bill, but allege that on that date defendant ceased manufacturing the infringing article, except to make up material on hand, and that prior to the filing of the bill it wholly abandoned such manufacture and sale, and has since neither made, used, nor sold the invention of the patent, but has made deliveries on contracts of sale previously made only, do not state facts constituting a bar to the suit, since, admitting such facts, the court may in its discretion grant an injunction to restrain a resumption of the infringement or the continued sale of the infringing articles, and require an accounting.

—General Electric Co. v. New England Electric Mfg. Co., 128 Fed. 738
63 C. C. A. 448

The making and selling of a single element of a patented combination, with the purpose and expectation that such element should be sent to a foreign country and be there used in combination with other elements, or in the practice of a method covered by the patent, is not contributory infringement, inasmuch as there was no intent that the element should be put to an infringing use; the protection of the patent not extending beyond the limits of the United States.

—Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105.....
63 C. C. A. 607

A preliminary injunction was granted restraining the defendant in an infringement suit from "the making, using, or selling of any apparatus embodying the inventions recited or specified" in the claims of three patents. The first two covered combinations of mechanical elements, one element in each being a motor which operated by the method of the third patent, covering such method alone. Pending the suit defendant made and shipped to a customer in Canada the motor of the patent, with the expectation and intent that it would be there used in the devices of the combination claims of the first two patents and in the practice of the method of the third patent. *Held*, that defendant was not chargeable with infringement nor guilty of a violation of the injunction, since (1) the making or selling of a single element of a combination is not an infringement of a patent covering the combination, but not the elements separately; (2) the making or selling of a machine adapted to practice the method of the third patent was not an infringement of such patent; and (3) the use of the patented combinations, or the practice of the patented method, in Canada, was not an infringement of the United States patents, and consequently defendant was not chargeable with contributory infringement.

—Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105.....
63 C. C. A. 607

PATENTS ENUMERATED.**ENGLISH.**

1886.

13,571. Water meter 628

UNITED STATES.**ORIGINAL.**163,242. Valve mechanism for air
brakes 183280,285. Valve mechanism for air
brakes 182

293,545. Fountain pen 648

354,281. Dyeing apparatus 322

360,070. Valve mechanism for air
brakes 180, 181, 183376,837. Valve mechanism for air
brakes 180, 182

379,805. Water meter 628

381,968. Electric motor 610, 614

382,279. Electric motor 610, 614

382,280. Electric motor 610, 612, 614

384,024. Water meter 628

405,705. Valve mechanism for air
brakes 182, 183

434,153. Incandescent lamp sockets. 534

418,678. Electric switch for motors 328

469,975. Casket handles 631

476,295. Cash register 619

478,168. Casket handles 630

481,134. Valve mechanism for auto-
matic air brakes 179

490,304. Cash register 619

491,020. Cash register 619

500,151. Knitting machine 304

503,103. Cotton seed delinter 307, 308, 317, 321

516,844. Receptacles 449

527,534. Disk water meter 626, 627, 628, 630

527,537. Disk water meter 626, 627, 630

527,539. Disk water meter 630

532,216. Coal trucks 448

556,972. Disc plows 166, 171, 172

559,898. Casket handles 630, 631

568,642. Water meter 628

599,625. Cash register 616

659,840. Cotton seed delinter 308, 317, 321

692,655. Disc plows 166, 171, 176

PAYMENT.

Part payment within statute of frauds, see "Frauds, Statute of," § 1.

To avoid forfeiture of insurance, see "Insurance," § 3.

PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

PERSONAL INJURIES.

See "Negligence."

Caused by explosives, see "Explosives."

To employé, see "Master and Servant," § 1.

To passenger, see "Carriers," § 1.

PETITION.

In bankruptcy, see "Bankruptcy," § 1.

PILOTS.

Where a steamboat was engaged in the regular coasting trade on inland rivers, a contract for the employment of a pilot for the term of one year, at the rate of \$100 per month, payable weekly by the master of such vessel, was reasonable and binding on the vessel.

—Baton Rouge & B. S. Packet Co. v. George, 128 Fed. 914.....
63 C. C. A. 640

PLEA.

In civil actions, see "Equity," § 3.

PLEADING.

Sufficiency to support judgment, see "Judgment," § 1.

In actions by or against particular classes of parties.

See "Indians."

In particular actions or proceedings.

See "Admiralty," § 2; "Equity," § 3.

Indictment or criminal information or complaint, see "Indictment and Information."

§ 1. Amended and supplemental pleadings and replender.

It was within the discretion of a trial court to refuse to permit the filing of an amended answer which sets up a new defense materially changing the issues, and which was not offered until after plaintiff had rested, and defendant had occupied two days in introducing evidence.

—*Alaska Commercial Co. v. Williams*, 128 Fed. 362..63 C. C. A. 92

POLICY.

Of insurance, see "Insurance."

POSSESSION.

Of mortgaged property, see "Chattel Mortgages," § 1.

POST OFFICE.

§ 1. Post-office department, post offices, postmasters, and other officers.

The bond of a letter carrier and of his surety for the faithful discharge of the duties and trusts imposed upon the former as a letter carrier, "either by the postal laws of the United States or the rules and regulations of the Post-Office Department of the United States," binds the surety for the faithful discharge by his principal of the duty of collecting letters and packages to be registered which was imposed upon the letter carrier by an order of the Post-Office Department during the term of the bond.

—*National Surety Co. v. United States*, 129 Fed. 70..63 C. C. A. 512

The parties to a bond for the faithful discharge of the duties of an office according to laws and regulations, which the obligee has the right and power to change at any time, necessarily contemplate and intend to guaranty thereby the discharge of the duties of the office imposed upon the principal by the subsequent legislation or regulation of the obligee during the term of the bond, which are within the scope of the office, and are germane to, and naturally connected with, its duties when the bond is made. They do not warrant or intend to guaranty the discharge of duties beyond the scope of the office, disconnected with its business or foreign to its duties at the time of the execution of the bond.

—*National Surety Co. v. United States*, 129 Fed. 70..63 C. C. A. 512

The duty of collecting letters and packages to be registered imposed upon letter carriers by the order of the Postmaster General of December 5, 1899, is within the scope of the office of a letter carrier, and germane to previous duties pertaining to it.

—*National Surety Co. v. United States*, 129 Fed. 70..63 C. C. A. 512

The United States may maintain an action against the surety on the bond of a letter carrier who has stolen letters to be registered for the value of the contents of the stolen letters, where the contents of no single letter exceeded \$10 in value, although the owners of the letters have made no claim against the government for indemnity, and nothing has been paid to them.

—National Surety Co. v. United States, 129 Fed. 70..63 C. C. A. 512

§ 2. Offenses against postal laws.

A silver certificate issued by the United States is a "pecuniary obligation or security of the government," and "an article of value," within the meaning of Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], and the secreting or destroying of a letter containing such a certificate, and the taking of such certificate from the letter, by a mail carrier, constitute embezzlement and larceny under said section.

—Bromberger v. United States, 128 Fed. 346.....63 C. C. A. 76

A letter properly stamped, with the receiving stamp of the office thereon, and placed in a carrier's pigeonhole at a postal station with other letters, addressed to a real person on his route, is "intended to be conveyed by mail," and its abstraction by the carrier and the taking of money therefrom constitutes an offense under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], although it was placed there by a postal inspector for the purpose of testing the carrier's honesty.

—Bromberger v. United States, 128 Fed. 346.....63 C. C. A. 76

An indictment under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], contained two counts, the first charging that defendant did unlawfully and willfully secrete, embezzle, and destroy a certain letter intended to be conveyed by mail, which came into defendant's possession by virtue of his office and employment as a letter carrier, and which contained articles of value described, and the second charging that defendant did steal, take, and carry away such articles of value described therein. *Held*, that such counts were not repugnant to each other as charging both embezzlement and theft of the same article, the one being for the embezzlement of the letter and the other for stealing its valuable contents.

—Bromberger v. United States, 128 Fed. 346.....63 C. C. A. 76

An indictment under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], charging a mail carrier with embezzlement of a letter containing an article of value, and with stealing such article, is sufficiently specific where it describes the letter and describes the article contained therein as a silver certificate of the United States, giving its denomination, without setting out specifically the marks and numbers thereon.

—Bromberger v. United States, 128 Fed. 346.....63 C. C. A. 76

On the trial of a mail carrier for embezzling a letter and stealing a bill therefrom, the letter being one of two decoy letters bearing a printed address to the same person, a witness for the government testified that he placed both the decoy letters in defendant's pigeonhole, with others, for delivery. Another carrier, as a witness for defendant, testified that he found two letters so addressed in his own pigeonhole, and placed them in the "misbox." *Held* that, to prevent an inference by the jury that they were the decoy letters, and that the one embezzled may have been retained by the last witness, it was competent for the government to show in rebuttal by a clerk in the office that he found two such letters in the misbox, and redistributed them into defendant's pigeonhole.

—Bromberger v. United States, 128 Fed. 346.....63 C. C. A. 76

In a prosecution under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], for larceny from the mails, an indictment charging that the stolen package had been placed in the mail, and came into defendant's possession in his capacity as a mail clerk, was sufficient to authorize the admission of evidence that the package had been stamped, and the manner of such stamping.

—Alexis v. United States, 129 Fed. 60.....63 C. C. A. 502

PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 3.
In land office, see "Public Lands," § 2.

In patent office, see "Patents," § 3.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Contempt," § 1; "Habeas Corpus," § 1; "Mandamus," § 1; "Trespass to Try Title," § 1.

Particular proceedings in actions.

See "Abatement and Revival"; "Costs"; "Damages," § 2; "Evidence"; "Execution"; "Judgment"; "Jury"; "Parties"; "Pleading"; "Removal of Causes"; "Trial."

Particular remedies in or incident to actions.

See "Garnishment"; "Receivers."

Procedure in criminal prosecutions.

See "Criminal Law"; "Extradition."

Procedure in exercise of special jurisdictions.

In admiralty, see "Admiralty"; "Collision," § 5.

In bankruptcy, see "Bankruptcy," § 1.

In equity, see "Equity."

Procedure on review.

See "Appeal and Error."

PREFERENCES.

As act of bankruptcy, see "Bankruptcy," § 1.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

PREMIUMS.

For insurance, see "Insurance," § 3.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."

PRINCIPAL AND SURETY.

Liabilities of sureties on bonds for performance of duties of letter carriers, see "Post Office," § 1.

Liabilities of sureties on bonds to prevent or discharge mechanics' liens, see "Mechanics' Liens," § 1.

PROCESS.*Particular forms of writs or other process.*

See "Execution"; "Garnishment"; "Mandamus."

PROFITS.

Loss of, as element of damages, see "Damages," § 2.

PROOF.

Taking and filing proofs in admiralty, see "Admiralty," § 3.

PROPERTY.

See "Fixtures"; "Improvements"; "Mines and Minerals"; "Shipping."
Taking for public use, see "Eminent Domain."

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.
Of personal injuries caused by negligence, see "Negligence," § 1.

PUBLIC LANDS.

Lands under water, see "Navigable Waters," § 1.

§ 1. Government ownership.

The provision of section 8, Act May 17, 1884, c. 53, 23 Stat. 24, 26, establishing a civil government for Alaska, and creating a land district therein, that "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress," applies to all lands, including tide lands, over which the federal government has exclusive jurisdiction and power of disposal, and protects possessory rights which were then exercised and claimed for fishing or other purposes by occupants of adjoining uplands against others who assert a common right to fish thereon.

—Heckman v. Sutter, 128 Fed. 393.....63 C. C. A. 135

The words "public lands" are not always used in the same sense in acts of Congress, and should be given such meaning in any act as comports with its purpose and intent.

—United States v. Blendaur, 128 Fed. 910.....63 C. C. A. 636

The 15 townships of land in the Bitter Root Valley, Mont., formerly occupied by the Flathead Indians, which by Act June 5, 1872, c. 308, 17 Stat. 226, providing for the removal of the Indians therefrom, were made subject to sale, and to which the homestead laws were extended by Act Feb. 11, 1874, c. 25, 18 Stat. 15, became a part of the general public domain, and, as such, were subject to Act March 3, 1891, c. 561, 26 Stat. 1103 [U. S. Comp. St. 1901, p. 1537], authorizing the President, by proclamation, to set apart forest reservations in "public lands."

—United States v. Blendaur, 128 Fed. 910.....63 C. C. A. 636

§ 2. Survey and disposal of lands of United States.

The jurisdiction of the Land Department over public lands continues so long as the legal title remains in the United States, and the decisions and rulings of that department in proceedings to acquire title to such lands, prior to the act which passes the legal title from the government, are interlocutory, and are as much open to review or reversal by the Land Department, while the legal title remains in the United States, as

are the interlocutory decrees of a court open to review upon the final hearing.

—Peyton v. Desmond, 129 Fed. 1.....63 C. C. A. 651

The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and the expression and entry of the final judgment, of the officers of the Land Department, and marks the termination of the jurisdiction of these officers.

—Peyton v. Desmond, 129 Fed. 1.....63 C. C. A. 651

The power of the Land Department to review its prior rulings, and to cancel existing entries, while the legal title remains in the United States, is not unlimited or arbitrary, and can be exercised only after notice to parties in interest and due opportunity for a full hearing.

—Peyton v. Desmond, 129 Fed. 1.....63 C. C. A. 651

The Land Department being a special tribunal to which Congress has confided the administration of the public land laws, the final judgment of that department as to matters of fact properly determinable by it is conclusive, when brought to notice in a collateral proceeding.

—Peyton v. Desmond, 129 Fed. 1.....63 C. C. A. 651

A state statute, purporting to regulate the effect of final receipts issued by the Land Department of the United States, cannot restrict the authority of the officers of that department in the disposition of the public lands, or withhold from the grantees of the United States any of the incidents of the transfer of the government title.

—Peyton v. Desmond, 129 Fed. 1.....63 C. C. A. 651

The doctrine of relation is applicable to public land transactions, and, where necessary to give effect to the intent of the statute or to cut off intervening claimants, the patent is deemed to relate back to the initiatory act.

—Peyton v. Desmond, 129 Fed. 1.....63 C. C. A. 651

A patent issued under the homestead laws relates back to the initiation of the claim, and gives the patentee the right to recover the value of timber wrongfully cut and removed from the land after the initiation of his claim, as established by the patent proceedings, and prior to the issuance of the patent.

—Peyton v. Desmond, 129 Fed. 1.....63 C. C. A. 651

One who purchases from an entryman, on the faith of a final receipt or patent certificate, before the issuance of a patent, takes only the equity of his vendor, subject to the authority of the Land Department to cancel the entry, while the legal title remains in the United States, if it is found that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it.

—Peyton v. Desmond, 129 Fed. 1.....63 C. C. A. 651

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

QUASHING.

Indictment or information, see "Indictment and Information," § 1.

RAILROADS.

See "Street Railroads."

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Removal to federal court, of actions by or against, see "Removal of Causes," § 1.

Subscription for stock by counties, see "Counties," § 1.

63 C.C.A.—48

§ 1. Right of way and other interests in land.

Where a railroad company has the charter power to acquire a right of way for railroad purposes, and it enters upon lands with the consent or license of the owner, and builds its railroad, expending money in the prosecution of the work, and holds it continuously for a period of more than 40 years, running trains over it daily, and exercising the acts of ownership that are necessary to keep the roadbed in proper condition during all that time, it acquires a right of way by prescription.

—*Louisville & N. R. Co. v. Smith*, 128 Fed. 1.....63 C. C. A. 1

§ 2. Indebtedness, securities, liens, and mortgages.

A conveyance of a railroad on foreclosure sale, subject to all outstanding contracts made and obligations incurred by the receivers, which were assumed by the purchaser, bound such purchaser or his grantees to accept tickets which had been sold by the receivers for the carriage of passengers over the road, and which were outstanding and unused at the time of the sale. *Wallace*, Circuit Judge, dissenting.

—*Erie R. Co. v. Littell*, 128 Fed. 546.....63 C. C. A. 44

An order, given by a railroad company, directing its treasurer to pay the holder a sum "out of the proceeds of the sale of the first bonds sold of this company," does not create a lien on the property of the company, afterwards sold and transferred before the issuance of any bonds to a second company, which assumed payment of the debt, so as to take precedence of a mortgage executed by the purchasing company to secure an issue of bonds, but the claim of the holder is subordinate to the lien of such mortgage.

—*Roberts v. Central Trust Co. of New York*, 128 Fed. 882.....
63 C. C. A. 220

Where a holder of bonds guarantied by a railroad company deposited them with a trust company for specific uses, and thereafter such company wrongfully refused to deliver the bonds on demand, the owner could not join an action to recover them with a suit against another corporation, which had acquired the assets of the guarantor company under void foreclosure proceedings, to apply such assets in payment of the bonds; such company being in no way responsible for the trust company's withholding of the bonds.

—*Sawyer v. Atchison, T. & S. F. R. Co.*, 129 Fed. 100.....
63 C. C. A. 602

Where the property of a railroad company was acquired by another railroad company under foreclosure proceedings which were void as against a holder of bonds guarantied by the mortgagor company, such bondholder was not entitled to sue the purchasing company in equity to apply the assets so transferred to the payment of his bonds, until he had exhausted his legal remedies against the mortgagor.

—*Sawyer v. Atchison, T. & S. F. R. Co.*, 129 Fed. 100.....
63 C. C. A. 602

REAL ACTIONS.

See "Trespass to Try Title."

RECEIVERS.

Of corporations in general, see "Corporations," § 4.

§ 1. Allowance and payment of claims.

Where a federal court could have acquired jurisdiction to appoint receivers for a foreign corporation only by consent of the parties, and no objection was made by any party to such appointment, or to a decree requiring the receivers to pay from the proceeds of the corporation's prop

erty all sums due employés, together with all the expenses of carrying on the business, the receivers could not thereafter, under the circumstances of this case, refuse to pay in full claims for wages earned by employés of the corporation prior to the receivers' appointment, none of which exceeded \$300 in amount, in preference to other unsecured claims.

—*Dickinson v. Saunders*, 129 Fed. 16.....63 C. C. A. 666

A decree appointing receivers for a foreign corporation, and directing that they continue to operate the property until otherwise directed, and from the moneys coming into their hands pay all sums due to employés and all expenses of carrying on the business, construed, under the circumstances, as requiring the receivers to pay from the proceeds of the corporation's property all claims for wages earned prior to their appointment, as well as wages earned thereafter.

—*Dickinson v. Saunders*, 129 Fed. 16.....63 C. C. A. 666

RECORDS.

Of conveyances as affecting rights of subsequent purchasers, see "Vendor and Purchaser," § 2.

On appeal in bankruptcy, see "Bankruptcy," § 8.

REFERENCE.

Review of discretion in overruling exceptions to report, see "Appeal and Error," § 5.

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

REGISTRATION.

Of assignments of patents, see "Patents," § 2.

RELEASE.

§ 1. Construction and operation.

Plaintiff, claiming a right of action for damages against C. and H. jointly for alleged fraudulent misrepresentations in the sale of cattle, accepted a certain amount of money from H., and executed a release discharging him from any and all liability by reason of such misrepresentations, and agreeing to indemnify him from being compelled to pay any further sum by reason thereof. The release, however, expressly provided that plaintiff did not relinquish or release any action or cause of action against C. by reason of the premises, but reserved his right to sue C. or the firm of C. Bros. on such cause of action. *Held*, that such instrument should not be treated as a technical release terminating plaintiff's cause of action against all the joint tortfeasors, but as a covenant not to sue H., and was therefore no defense to an action against C.

—*Carey v. Bilby*, 129 Fed. 203.....63 C. C. A. 361

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Cancellation of Instruments," § 1; "Equity," § 1.

REMOVAL OF CAUSES.

§ 1. Proceedings in cause after removal.

Where an action brought in a state court under a Code which abolishes forms of action is removed into a federal court, where different modes of procedure obtain in cases at law and in equity, it becomes necessary to determine the nature of the case, and to assign it to the law or equity side of the court accordingly, and to reframe the pleadings if necessary.

—Fletcher v. Burt, 126 Fed. 619.....63 C. C. A. 201

A bondholder of an insolvent railroad company whose property has been sold in foreclosure proceedings, suing on behalf of himself and other bondholders, stockholders, and general creditors, cannot maintain an action at law in a federal court to recover a judgment for damages against a former receiver for alleged fraudulent acts in depreciating the value of the property prior to the sale, and the rule is not changed by the fact that the action was instituted in a state court under a Code which abolishes all forms of action, and adopts the equity rule as to parties and the joinder of causes of action.

—Fletcher v. Burt, 126 Fed. 619.....63 C. C. A. 201

On the removal of a cause instituted as one at law to recover a judgment for damages, but which is not maintainable as such in the federal court, where a demurrer on that ground was rightly sustained, and the plaintiff declined to amend his pleading to bring the case into the equity side of the court, but sued out a writ of error, he is bound by his election, and the judgment dismissing his action will be affirmed.

—Fletcher v. Burt, 126 Fed. 619.....63 C. C. A. 201

RENEWAL.

Of lease, see "Landlord and Tenant."

Of mining leases, see "Mines and Minerals," § 1.

REOPENING CASE.

See "Criminal Law," § 3.

REQUESTS.

For instructions in criminal prosecutions, see "Criminal Law," § 3.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

RES JUDICATA.

Conclusiveness of foreign judgment, see "Judgment," § 3.

REVENUE.

See "Customs Duties"; "Internal Revenue."

REVIEW.

See "Admiralty," § 4; "Appeal and Error"; "Criminal Law," § 5; "Habeas Corpus."

RIGHT OF WAY.

See "Easements."

Of railroads, see "Railroads," § 1.

ROYALTIES.

On produce of mines, see "Mines and Minerals," § 1.

SALES.

See "Vendor and Purchaser."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Requisites and validity of contract.

Where an offer by a broker to sell cotton for future delivery was accepted subject to confirmation by his principal, as customary in the trade, and before confirmation the seller became insolvent, a demand for security by the intending purchaser was not a waiver of the requirement of confirmation.

—*Johnston v. Fairmont Mills*, 129 Fed. 74.....63 C. C. A. 516

Where there was an established custom in the cotton trade for both buyer and seller to confirm to each other in writing a sale made by a broker, an offer by a broker to sell cotton for future delivery to a cotton mill, accepted by the mill company "subject to confirmation" by the seller named in the offer, did not create a contract, and the acceptance was subject to withdrawal at any time before such confirmation.

—*Johnston v. Fairmont Mills*, 129 Fed. 74.....63 C. C. A. 516

A proposal to accept an offer for the purchase of cotton on terms varying materially from those offered is a rejection of the offer, and does not create a contract binding the purchaser.

—*Johnston v. Fairmont Mills*, 129 Fed. 74.....63 C. C. A. 516

§ 2. Performance of contract.

Where brokers made a contract for the sale of yarn for plaintiff to an undisclosed buyer, and, while the contract was being carried out and deliveries made, the brokers requested a suspension of deliveries until further notice, and subsequently advised plaintiff that their customer had notified them that he would not receive any more goods under the contract, on account of the quality of the goods previously delivered, such notice constituted an unconditional breach of the contract.

—*Lincoln v. Levi Cotton Mills Co.*, 128 Fed. 865.....63 C. C. A. 333

§ 3. Operation and effect.

Mere possession of personal property by the seller, if there be no other evidence of ownership or power of disposal, will not preclude a third person, who is the true owner, from reclaiming his property or its value from the purchaser.

—*Gentry v. Singleton*, 128 Fed. 679.....63 C. C. A. 231

§ 4. Remedies of seller.

Where yarn was sold by a manufacturer through a broker, the manufacturer, on a breach of the contract by the buyer, was not bound to sell the yarn in the open market, and hold the buyer for the difference between what he realized from such sale and the contract price, but was entitled to recover the profit he would have made if the buyer had not prevented the performance of the contract, less the profit actually received from the sales to others.

—*Lincoln v. Levi Cotton Mills Co.*, 128 Fed. 865.....63 C. C. A. 333

§ 5. Remedies of buyer.

In an action to recover for failure to deliver twine of the quality called for by the contract, the proper measure of damages is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty. Neither the vendee's right of recovery, nor the measure of his damages, is dependent on a resale by him, or upon the price obtained at a resale.

—Union Selling Co. v. Jones, 128 Fed. 672.....63 C. C. A. 224

SALVAGE.**§ 1. Right to compensation.**

A contract by an owner of tugs to tow dumpers from their dumps in the city to sea and return imposed no obligation on the master and crew of one of the tugs to go to the rescue of a dumper which had been abandoned by another tug, and had drifted out to sea; and where they did so, and at considerable peril to themselves rescued her, and brought her safely to port, the service was voluntary, and they are entitled to compensation as salvors.

—The Dumper No. 8, 129 Fed. 98.....63 C. C. A. 600

§ 2. Amount and apportionment.

A salvage award of \$6,500 for the rescue of a schooner valued, as saved, with her cargo and freight, at \$32,800, which was stranded on the coast of New Jersey, reduced on appeal to \$4,500; it appearing to have been increased to some extent by a misapprehension by the trial judge of the facts shown by the evidence as to the peril of the stranded vessel.

—The Edith L. Allen, 129 Fed. 209.....63 C. C. A. 867

A salvage award of \$1,175 to the master and crew of a tug, consisting of nine men, for the rescue of a dumper worth \$8,000 to \$10,000, which had become derelict, and drifted 25 miles out to sea in a gale, and would probably have been a total loss, *held* not excessive, where the service was entirely successful, and was performed at considerable personal risk.

—The Dumper No. 8, 129 Fed. 98.....63 C. C. A. 600

SATISFACTION.

See "Release."

SEAMEN.

Admiralty jurisdiction for injuries, see "Admiralty," § 1.

Injuries caused by negligence of employers, see "Master and Servant," § 1.

Under the maritime law of the United States a suit may be maintained by a seaman against the ship to recover damages for the neglect of the master to furnish him proper care and medical attendance after he was injured by being assaulted by the master.

—The Matterhorn, 128 Fed. 863.....63 C. C. A. 331

Under the general maritime law, as recognized and administered by the admiralty courts of the United States, a seaman may maintain a suit in rem to recover damages caused by the failure of a master to furnish him with proper care, treatment, and supplies after his accidental injury in the service of the ship—the duty being one which rests upon the ship, in respect to which the master represents the owners; and neither the British admiralty decisions, nor the English merchants' shipping act, deny such right, although in matters relating to the navigation of the ship the English decisions treat the master and crew as fellow servants.

—The Troop, 128 Fed. 856; Kenney v. Louis, Id....63 C. C. A. 584

A decree affirmed which awarded a seaman \$4,000 damages against a ship on the ground of the gross negligence of the master in failing to furnish libellant proper care and medical attendance after his accidental injury in the service of the ship, by reason of which he suffered greatly and was permanently crippled.

—The Troop, 128 Fed. 856; Kenney v. Louis, Id....63 C. C. A. 584

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 2.

SECRETARY OF WAR.

See "Army and Navy."

SERVITUDES.

See "Easements."

SET-OFF AND COUNTERCLAIM.

In action to dispossess intruder on Indian lands, see "Indians."

SETTLEMENT.

See "Release."

SHERIFFS AND CONSTABLES.

§ 1. Powers, duties, and liabilities.

Where officers, having in their hands for service a writ of attachment for \$12,000, at the instance of the attachment plaintiff seized and removed only the main belt in a marble mill, worth not to exceed \$20, but the effect of which was to stop the operation of the mill, when there was unincumbered real and personal property belonging to the defendant and subject to attachment sufficient in value to satisfy the writ, a jury is justified in imputing to them the malicious intent of the attaching plaintiff, and in awarding exemplary damages against them in an action for the trespass.

—Giddings v. Freedley, 128 Fed. 355.....63 C. C. A. 85

Officers who, by the wrongful and illegal execution of a writ of attachment, stop the operation of machines, may be subjected to the payment of damages for the loss of use of such machines, and it is no defense that in the lawful execution of the writ they might have seized and removed the machines.

—Giddings v. Freedley, 128 Fed. 355.....63 C. C. A. 85

SHIPPING.

See "Admiralty"; "Collision"; "Pilots"; "Salvage"; "Seamen"; "Towage." Insurable interest of charterer of steamship in goods carried, see "Insurance," § 1.

Marine insurance, see "Insurance," § 4.

§ 1. Liabilities of vessels and owners in general.

In an action against the owner of a vessel for injuries to a servant of an elevator company, caused by his falling into the hold, as the result of the insufficiency of light, after the vessel's hatches had been closed, evi-

dence held to authorize the submission of the question of defendant's negligence and plaintiff's contributory negligence to the jury.

—*Netherlands-American Steam Nav. Co. v. Diamond*, 128 Fed. 570...
63 C. C. A. 212

Where the superintendent of an elevator, who had charge of the loading of a vessel, testified that he had no control over the vessel's men, and denied that he gave any directions or requested the hatches to be closed, and only a single witness testified that the superintendent wanted to cover up the hatches on account of the rain, and that witness ordered it to be done, but did not testify that the superintendent ordered the hatch covered so as to exclude the light, which could have been prevented. It was not error for the court, in an action for injuries to a servant of the elevator company caused by the shutting off of the light by the closing of the hatches, to refuse to charge that, if the jury believed that the seamen covered the hatch by direction of the elevator superintendent, plaintiff could not recover on the ground that, if the act in so doing was negligent, it was the negligence of plaintiff's fellow servant.

—*Netherlands-American Steam Nav. Co. v. Diamond*, 128 Fed. 570...
63 C. C. A. 212

Where a servant of an elevator company was injured by falling into the hold of a vessel, alleged to have resulted from the negligent shutting off of the light from the hatches by the seamen, a requested instruction that defendant was entitled to close its hatches in the rain, and was not at fault for having no light in the tank or on the orlop deck, and was not bound to furnish electric light for the elevator company's men, was properly modified by adding that such right to shut off the light was to be considered with reference to defendant's relation to plaintiff while using the hatch light as bearing on the question of defendant's negligence.

—*Netherlands-American Steam Nav. Co. v. Diamond*, 128 Fed. 570...
63 C. C. A. 212

Where, in an action for injuries to a servant of an elevator company by falling into the hold of a vessel, the court sufficiently stated the rule to be applied by the jury in determining whether or not plaintiff had been guilty of contributory negligence, the court was not bound to give requested instructions directing the jury's attention to plaintiff's particular acts bearing on such question.

—*Netherlands-American Steam Nav. Co. v. Diamond*, 128 Fed. 570...
63 C. C. A. 212

Where plaintiff was directed to go into the hold of a vessel, in order to trim grain, which had been loaded therein, and the vessel's servants, with knowledge that plaintiff had gone into the hold, and needed the light which came from the open hatches, and after being requested not to close the same, did so, without answering such request, and plaintiff was thereafter precipitated into the hold, by stepping on a misplaced bin cover, while groping his way in the dark with his shovel in front of him, requested instructions which ignored such evidence, tending to show that defendant had negligently placed plaintiff in a position of peril, and which assumed that what plaintiff did constituted contributory negligence as a matter of law, were properly refused.

—*Netherlands-American Steam Nav. Co. v. Diamond*, 128 Fed. 570...
63 C. C. A. 212

§ 2. Carriage of goods.

In a suit against a steamship to recover for damage to cargo during a voyage from London to New York, caused by the escape of steam through partially open valves, the finding of the trial court that the evidence on behalf of the claimant was insufficient to show that the valves were closed when the steamer sailed affirmed.

—*The Manitou*, 127 Fed. 554.....63 C. C. A. 109

A vessel cannot be said to be seaworthy for a voyage where, at its inception, she has little, if any, metacentric height, and a list of 8 or 9

degrees, and her cargo weight is so distributed that her instability must increase as she proceeds from the consumption of coal and water.

—The *Onelda*, 128 Fed. 687.....63 C. C. A. 239

In a suit to recover for loss of cargo by the sinking of a ship, the burden of proving seaworthiness at the beginning of the voyage rests upon the shipowner.

—The *Onelda*, 128 Fed. 687.....63 C. C. A. 239

Under a bill of lading for cotton to be carried from Charleston to New York, which provided that loss or damage to the cotton should be computed on the basis of its value at the time and place of shipment, where it was delivered in New York in a damaged condition, the shipowner is not entitled to have the amount of the freight deducted from its value as ascertained pursuant to such provision.

—The *Onelda*, 128 Fed. 687.....63 C. C. A. 239

The cotton was shipped to Liverpool for sale in compliance with the recommendation of the surveyors who adjusted the loss, and with the knowledge of the shipowners, who made no objection. *Held*, that they were not bound by the erroneous decision of the surveyors, nor estopped to claim credit for the New York value of the cotton, where they at no time gave a positive assent to the substitution of the Liverpool value.

—The *Onelda*, 128 Fed. 687.....63 C. C. A. 239

A ship carried a cargo of cotton from Charleston to New York, from which place it was to be forwarded to Liverpool, but under a separate and independent contract of affreightment. The bill of lading provided that in case of loss or damage the value of the cotton in Charleston at the time of shipment should be taken as the basis for computing the damages. The cotton was damaged before its delivery in New York through the unseaworthiness of the ship. *Held*, that the contract of carriage terminated in New York, and the ship was entitled to credit for the value of the cotton in its damaged condition in that market, and not in the Liverpool market, and that it was error to give credit for the proceeds of its sale in Liverpool, less the freight from New York, the amount being materially less than would have been realized by its sale in New York.

—The *Onelda*, 128 Fed. 687.....63 C. C. A. 239

A ship started on her voyage with a list of 8 or 9 degrees, which increased to such an extent, in consequence of her improper loading, that it was imprudent to proceed, and she put in at an intermediate port. Having opened a port to readjust the cargo while lying at a pier, the ship gave a sudden lurch, which brought the port under water, and she sank, damaging the cargo. *Held*, that the damage was attributable to her initial instability, which rendered her unseaworthy at the beginning of the voyage, and for the consequences of which the owners were not exempted from liability by the Harter act.

—The *Onelda*, 128 Fed. 687.....63 C. C. A. 239

§ 3. Carriage of passengers.

Where the officer in charge of a boat sent ashore from a ship to bring off passengers stated that she was overloaded, and requested some of the passengers to get out and wait until he could return, but, on their refusal to do so, made no further attempt to exercise his authority, but started, carrying 18 persons and a quantity of baggage, whereas the boat's capacity was 14 persons, and made no effort to return when, after reaching rough water, it became apparent that the boat was in great danger, and she swamped, and some of the passengers were drowned, the officer was chargeable with gross negligence, for which the ship is liable; and the contributory negligence of the passengers, if conceded, constitutes no defense to such liability, under the rule that such negligence will not defeat the action when it is shown that defendant might, by the exercise of proper and reasonable care, have avoided the consequences thereof.

—*Weisshaar v. Kimball S. S. Co.*, 128 Fed. 397.....63 C. C. A. 139

§ 4. Limitation of owner's liability.

Where the president of a steamship company was present in a small boat sent ashore by one of the company's ships, and acquiesced in the action of the officer in charge in negligently permitting the boat to be overloaded, in consequence of which it was swamped, and a number of the passengers were drowned, such negligence of the officer was with "the privity or knowledge" of the company, which is not entitled to a limitation of its liability for claims arising out of the disaster, under Rev. St. §§ 4283-4285 [U. S. Comp. St. 1901, p. 2944].

—Weisshaar v. Kimball S. S. Co., 128 Fed. 397.....63 C. C. A. 129

SILVER CERTIFICATES.

Larceny from mails, see "Post Office," § 2.

SPECIFIC PERFORMANCE.**§ 1. Good faith and diligence.**

Defendant, who had sold land to plaintiff and taken a trust deed securing the purchase money, on default caused the land to be sold under a power of sale therein. The place of sale was remote from railroad and telegraph, and the attorney and agent of plaintiff, who resided there, having received no instructions from him, sought to delay the sale by making objections to its regularity; the result being an agreement by which the objections were withdrawn. The land was sold, and bid in by defendant for the amount of the debt, and he gave the agent a paper, signed by him, by which he agreed that plaintiff might have 10 days in which to repay the purchase money, and on payment of which he was to resell to him or cancel the sale. Neither the attorney nor agent of plaintiff had authority to bind him by any contract. *Held* that, it being shown that defendant was in urgent need of money and that the time fixed in the option was determined only after negotiation, and was longer than he desired, such time must be held of the essence of the contract, and a court of equity is not authorized to extend it by enforcing specific performance, after the time has expired without any offer of performance by plaintiff.

—Woods v. McGraw, 127 Fed. 914.....63 C. C. A. 556

STALE DEMAND.

See "Equity," § 2.

STATES.

See "United States."

Courts, see "Courts."

Interstate extradition, see "Extradition," § 1.

Rights to public lands under navigable waters, see "Navigable Waters," § 1.

STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 3.

Provisions relating to particular subjects.

See "Aliens"; "Customs Duties"; "Indians"; "Master and Servant," § 1; "Mechanics' Liens"; "Patents," § 2; "Public Lands," § 1; "Street Railroads," § 1.

Debts of insolvents to United States, see "United States," § 1.

Revenue laws, see "Internal Revenue."

Statute of frauds, see "Frauds, Statute of."

§ 1. **Enactment, requisites, and validity in general.**

Where a bill introduced into the Florida Senate was regularly passed by a call of the yeas and nays and referred to the House, where on its second reading a substitute was introduced by the judiciary committee, regularly passed, and forwarded to the Senate, the fact that the Senate treated the substitute as an amendment of the original bill, and concurred in it without the formality of a roll call, did not invalidate the act on the ground that it was not passed in conformity with the state Constitution, which requires the yeas and nays to be taken on the final passage of a bill.

—Callison v. Brake, 129 Fed. 196.....63 C. C. A. 354

Act N. C. Feb. 2, 1893 (Pub. Acts 1893, p. 69, c. 70), authorized Henderson county to issue bonds to refund a former issue made in 1874 in aid of a railroad, and provided that such bonds should be deemed a continuation of the liability created by the former issue, and should not "be taken, construed, deemed nor held as the creation of a new debt nor liability." Held that, under the law of the state as determined by its Supreme Court prior to its passage, such act did not provide for the creation of an indebtedness, assuming the original bonds to have been valid, and did not, therefore, come within article 2, § 14, of the state Constitution, requiring bills for acts creating or authorizing a state, county, or municipal indebtedness to be read three several times in each house on different days, and the yeas and nays on the second and third readings to be entered on the journals.

—Board of Com'rs of Henderson County v. Travelers' Ins. Co., 128 Fed. 817.....63 C. C. A. 467

§ 2. **Pleading and evidence.**

Where the recitals in legislative journals relating the passage of a bill show that such bill was introduced and referred to a committee, and that it subsequently passed its second and third readings by a recorded vote, and the act was ratified by the presiding officers, who certified that it had passed three readings, it sufficiently appears that it had a first reading.

—Board of Com'rs of Henderson County v. Travelers' Ins. Co. 128 Fed. 817.....63 C. C. A. 467

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Of execution, see "Execution," § 1.

Pending appeal or writ of error, see "Appeal and Error," § 3.

STOCK.

Corporate stock, see "Corporations," § 1.

STOCKHOLDERS.

Of corporations, see "Corporations," § 2.

STREET RAILROADS.

§ 1. Regulation and operation.

The New York statute (Laws 1890, p. 1126, c. 565, § 136), which provides that no train on an elevated railroad shall be permitted to start from a station until every passenger upon the platform desiring to enter the cars shall have done so, unless due notice has been given that the cars are filled, must be given a reasonable construction, and cannot be held to require gates of cars to be opened after they have been closed and a signal to start given, or after they have actually started, because people may thereafter come onto the platform and desire to take the train, which in many cases of daily occurrence would wholly prevent the operation of trains.

—Lauterer v. Manhattan Ry. Co., 128 Fed. 540.....63 C. C. A. 38

SUPERSEDEAS.

On appeal or writ of error, see "Appeal and Error," § 3.

SURRENDER.

Of written instrument for cancellation, see "Cancellation of Instruments."

TARIFF.

See "Customs Duties."

TAXATION.

See "Customs Duties"; "Internal Revenue."

TELEGRAPHS AND TELEPHONES.

§ 1. Regulation and operation.

Where a mining expert delivered a telegram to defendant telegraph company advising the purchase of certain mining stock, which message he directed to be transmitted to plaintiff and 293 others, who were his clients, under an agreement to transmit the same at once, there being other methods of rapid communication between the sending office and plaintiff's place of business, it was the duty of the telegraph company, on discover-

ing that it would not be able to transmit such message to plaintiff without delay, by reason of a defect in its wires, to promptly notify the sender of such fact, he being a person well known to the company's agents at the sending office, and easily accessible.

—*Swan v. Western Union Tel. Co.*, 129 Fed. 318....63 C. C. A. 530

Where a mining expert delivered a message to a telegraph company to be sent to plaintiff, his client, advising the purchase of certain mining stock, which defendant agreed to promptly transmit, but failed to notify either the sender or the addressee that there had been several hours' delay, by reason of which the addressee was led to purchase the stock at a higher price than he would have been compelled to pay if the message had been promptly delivered before the close of an exchange on the day it was sent, the addressee was entitled to recover the difference between what he had to pay for the stock which he purchased the succeeding day and what the stock would have cost him if the telegram had been transmitted within a reasonable time after it was received for transmission.

—*Swan v. Western Union Tel. Co.*, 129 Fed. 318....63 C. C. A. 530

TERMS.

Of leases, see "Landlord and Tenant," § 1.

TIME.

As essence of contract, see "Specific Performance," § 1.

TITLE.

To public land, see "Public Lands," § 2.

TORTS.

Admiralty jurisdiction, see "Admiralty," § 1.

Causing death, see "Death," § 1.

By particular classes of parties.

Owners of vessels, see "Shipping," § 1.

Particular torts.

See "False Imprisonment," § 1; "Libel and Slander"; "Negligence,"

Maritime torts, see "Collision."

TOWAGE.

Collisions with tugs and vessels in tow, see "Collision," § 3.

Right of master and crew of tug to compensation for salvage, see "Salvage," § 1.

A towing vessel cannot relieve itself by contract from liability for the failure to exercise reasonable care and skill in the performance of the service and for the safety of the tow.

—*Alaska Commercial Co. v. Williams*, 128 Fed. 362..63 C. C. A. 92

A steamer contracted to carry men and freight for a mining company from Juneau to Lituya Bay, in Alaska, and also to tow a small schooner belonging to the company and used as a lighter. The entrance to the bay is narrow, and can only be passed safely at slack tide. Arriving off the entrance the master deemed it unsafe to enter at that time, and, the

manager of the company on board refusing to consent that the men and stores should be loaded on the schooner and left outside, he proceeded with the tow up the coast. On the way the hawser parted, but the steamer proceeded without stopping, leaving the schooner adrift in the open sea, with five men on board, none of whom were acquainted with the coast. She was never seen afterwards, and all that was ever known of the fate of the men on board was the finding of the body of one on the beach. *Held*, that the obligation of reasonable care on the part of the steamer continued after leaving the bay, and that nothing in the towing contract would relieve her from liability for the abandonment of the tow, there being nothing in the situation which made such abandonment necessary.

—*Alaska Commercial Co. v. Williams*, 128 Fed. 362..63 C. C. A. 92

The agreement of a boat to be towed at her own risk does not exempt the tug from liability for damages occasioned by her own negligence, or the failure of the master, who is responsible for the navigation of both vessels, to exercise ordinary care and skill to see that the tow is properly made up, and that the hawsers are of proper length, strong, and securely fastened, because such liability does not arise out of the towage contract, but is imposed by law. On the other hand, the master of a boat, who offers her as a tow, represents her as sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage, and the tug is not liable for damages resulting from the weakness, decay, or leaks of the tow, or other defects which render her unseaworthy, and which are not known or obvious to the master of the tug.

—*The Edmund L. Levy*, 128 Fed. 683.....63 C. C. A. 235

Evidence considered, and *held* not to sustain the claim of a libellant that the sinking of a canal boat, while being towed by a tug through floating ice, was due to the negligence of the tug in using a hawser from 125 to 150 feet long, but to show by a preponderance that under the circumstances such length was a proper one, and that the tow was properly made up and carefully navigated.

—*The Edmund L. Levy*, 128 Fed. 683.....63 C. C. A. 235

TOWNS.

See "Counties."

TRANSITORY ACTIONS.

See "Courts."

TRESPASS.

To the person, see "False Imprisonment."

TRESPASS TO TRY TITLE.

§ 1. Proceedings.

Where plaintiff in an action at law to determine the title to lands pleads a legal title, and proves conveyances which on their face vest the title in him, and defendants set up a claim under a prior unrecorded conveyance from a common source of title, which, under the laws of the state, is void as against subsequent bona fide purchasers for value, without notice, evidence is admissible in rebuttal to show that plaintiff was such a purchaser; such evidence not tending to establish an equitable title, but being in support of plaintiff's legal title.

—*Lee v. Wysong*, 128 Fed. 833.....63 C. C. A. 483

Certain lands in Texas were conveyed to two individuals, who were at the time partners. In 1853 an act of sale was executed by one partner

to the other in New Orleans, covering all his interest in the partnership property. Such instrument was not sufficient as a conveyance of lands under the laws of Texas, and it was not recorded in the state. In 1901 the sole heir of the partner executing such instrument, through an attorney in fact, sold and conveyed an undivided half interest in the land for a valuable consideration to plaintiff's grantor; neither such purchaser nor plaintiff having any knowledge of any adverse title or claim. Rev. St. Tex. art. 4640, provides that an unrecorded conveyance shall be void as against the purchaser for value without notice. *Held* that, in an action at law to determine the title to the land, the act of sale was not admissible as an evidence of title, since at most it conveyed merely an equitable right, where there was no satisfactory proof that the lands were ever the property of the partnership, or that they were obtained from debtors.

—Lee v. Wysong, 128 Fed. 833.....63 C. C. A. 483

TRIAL.

See "Witnesses."

Exceptions for purpose of review, see "Appeal and Error," § 2.

Trial of particular civil actions or proceedings.

See "Bankruptcy," § 1; "False Imprisonment," § 1; "Libel and Slander," § 1; "Negligence."

Against innkeepers, see "Innkeepers."

For causing death, see "Death," § 1.

For death caused by explosive, see "Explosives."

For personal injuries, see "Carriers," § 1; "Master and Servant," § 1; "Shipping," § 1.

Trial of criminal prosecutions.

See "Criminal Law," § 3.

§ 1. Taking case or question from jury.

When the evidence so conclusively entitles one party to a verdict that a verdict for his opponent would have to be set aside, the court may properly direct a verdict in his favor.

—Gentry v. Singleton, 128 Fed. 679.....63 C. C. A. 231

§ 2. Instructions to jury.

It is the well-settled rule of the federal courts that all exceptions to a charge must be specific and be taken before the jury retires. A general exception to several propositions, either given or refused, will be overruled, if any one was correctly given or refused.

—Erie R. Co. v. Littell, 128 Fed. 546.....63 C. C. A. 44

Where a single exception to a charge covers several distinct propositions, it is inoperative if any one of the propositions is sound.

—Giddings v. Freedley, 128 Fed. 355.....63 C. C. A. 86

TRUSTS.

Trust deeds, see "Chattel Mortgages."

TUGS.

See "Towage."

UNDISCLOSED AGENCY.

See "Brokers," § 2.

UNITED STATES.

See "Army and Navy"; "Customs Duties"; "Post Office."

Courts, see "Courts"; "Removal of Causes."

Indians, see "Indians."

Public lands, see "Public Lands," § 2.

§ 1. Property, contracts, and liabilities.

The surety on the bond of a contractor, who when sued thereon pays into court the amount of the penal obligation of the bond, and is thereupon discharged from further liability, is not entitled to the allowance of counsel fees from the fund, which is insufficient to pay the claims of creditors of the principal against it.

—United States v. Heaton, 128 Fed. 414.....63 C. C. A. 156

Rev. St. §§ 3466-3468 [U. S. Comp. St. 1901, p. 2314], which provides that debts due the United States shall have priority in the administration of the estates of insolvents, and that a surety who pays the debt shall be subrogated to such right of priority, do not give the United States such right of priority in a fund paid into court by the surety on the bond of a contractor for government work in discharge of the obligation of the bond, which under the statute and its terms secures the claims of other creditors of the insolvent contractor as well as that of the United States, and in the absence of statutory provision such right of priority does not exist.

—United States v. Heaton, 128 Fed. 414.....63 C. C. A. 156

The fact that the United States first commenced an action on the bond does not give it a right to priority, and, the fund having been paid into court, the right of the United States therein under the statute may properly be determined by the court as against other creditors brought in without objection, although the action is one at law.

—United States v. Heaton, 128 Fed. 414.....63 C. C. A. 156

USAGES.

See "Customs and Usages."

VALUE.

Limits of jurisdiction, see "Courts," § 3.

VENDOR AND PURCHASER.

See "Sales."

Sale of public lands, see "Public Lands," § 2.

Specific performance of contract, see "Specific Performance."

§ 1. Requisites and validity of contract.

Defendant, who had sold land to plaintiff, and taken a trust deed securing purchase money, on default caused the land to be sold under a power of sale therein. The place of sale was remote from railroad and telegraph, and the attorney and agent of plaintiff, who resided there, having received no instructions from him, sought to delay the sale by making objections to its regularity, the result being an agreement by which the objections were withdrawn, the land was sold, and bid in by defendant for the amount of the debt, and he gave the agent a paper signed by him, by which he agreed that plaintiff "may have 10 days in which to repay me the purchase money of land and \$250 in full of costs, etc., and on payment of which I will resell land to him or cancel this sale." Neither the attor-

63 C.C.A.—49

ney nor agent of plaintiff had authority to bind him by any contract. *Held*, that the instrument merely gave him an option to repurchase the land, and did not operate as an extension of time for him to redeem from the mortgage, or continue his indebtedness thereunder.

—*Woods v. McGraw*, 127 Fed. 914.....63 C. C. A. 556

§ 2. Rights and liabilities of parties.

Certain tracts of land in Texas were conveyed to two individuals, who were at the time partners. In 1853 an act of sale was executed by one partner to the other, in New Orleans, covering all his interest in the partnership property, "consisting of the stock in trade * * * real estate taken by the said firms from their debtors in settlement of their debts and situate in the states of Mississippi and Texas. * * *" Such instrument was not sufficient as a conveyance of lands under the laws of Texas, nor was it recorded in that state. In 1901 the sole heir of the partner executing such instrument, through an attorney in fact, sold and conveyed an undivided half interest in the Texas lands, for a valuable consideration, to plaintiff's grantor; neither such purchaser nor plaintiff having any knowledge of any adverse title or claim. Rev. St. Tex. art. 4640, provides that an unrecorded conveyance shall be void as against a purchaser for value without notice. *Held*, that plaintiff acquired the legal title to the land, as well as the superior equity.

—*Lee v. Wysong*, 128 Fed. 833.....63 C. C. A. 483

VERDICT.

Directing verdict in civil actions, see "Trial," § 1.

VESSELS.

See "Shipping."

Liability of master for violation of immigration laws, see "Aliens," § 2.

WAIVER.

See "Estoppel."

Grounds of abatement, see "Abatement and Revival," § 2.

Of defect of parties, see "Parties," § 1.

WAR.

See "Army and Navy."

WARRANT.

See "Criminal Law," § 1.

For arrest, sufficiency to protect officer, see "False Imprisonment," § 1.

WARRANTY.

Covenant of, see "Covenants."

On sale of goods, see "Sales," § 5.

WATERS AND WATER COURSES.

See "Navigable Waters."

WHARVES.

Use of land under water for, as divesting city of title, see "Navigable Waters," § 1.

WITNESSES.

See "Evidence."

Opinions, see "Evidence," § 6.

Review of discretion of court in refusing to exclude, see Criminal Law," § 5.

§ 1. Examination.

Where, in a proceeding to condemn a vessel for violating the United States revenue laws, in removing and concealing certain intoxicating liquors with intent to escape payment of revenue taxation, at the conclusion of the evidence the question of the identity of the liquor was in doubt, it was proper for the court, on its own motion, to recall an internal revenue collector who had testified, and question him further on such issue.

—The Kawallani, 128 Fed. 879.....63 C. C. A. 347

WORK AND LABOR.

Liens for work and materials, see "Mechanics' Liens."

WRITS.

Particular writs.

See "Execution"; "Habeas Corpus"; "Mandamus."

Writ of error, see "Appeal and Error."

YEAR.

Estates for years, see "Landlord and Tenant."

[END OF VOLUME.]



